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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 436

JOSEPH DE ZON, PETITIONER,

vs.

AMERICAN PRESIDENT LINES, LTD.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 2, 1942.

CERTIORARI GRANTED NOVEMBER 9, 1942.

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**IN THE UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE NINTH CIRCUIT**

No. 9984. Jul. 3, 1942

JOSEPH DE ZON, Appellant,

vs.

AMERICAN PRESIDENT LINES, LTD., a Corporation, Appellee

Upon Appeal from the District Court of the United States
for the Northern District of California, Southern Division

OPINION—Filed July 3, 1942

Before Garrecht and Healy, Circuit Judges, and Fee,
District Judge

GARRECHT, Circuit Judge:

This action, brought by Joseph DeZon under the Jones Act (41 Stat. 1007; 46 U. S. C. A. § 688), was heard in the District Court of the United States for the Northern District of California, Southern Division. The grievance complained of is that defendant-appellee, American President Lines, Ltd., "negligently and carelessly failed and refused to provide plaintiff with adequate and sufficient medical care and attention * * * with the result that the infection to plaintiff's right eye grew steadily worse until * * * it was necessary to remove the eye". A verdict directed for defendant was returned by the jury, and from the judgment entered thereon plaintiff has appealed.

The pertinent facts of the case are these:

Plaintiff was a seaman aboard defendant's vessel, S.S. "President Taft", and on or about June 3, 1940, at approximately ten o'clock in the morning, while chipping away old paint and repainting in the boiler room, in pursuance of his duties, plaintiff got a chip of paint in his eye and also some fresh paint from his brush. Immediately he went to his [fol. 2] quarters, where he washed out his eye with some eyewash which he had. That evening he stood his watch, although he didn't feel very well. In the morning, because his eye pained him, he consulted the ship's physician and

surgeon, Dr. Will Lewis, who was a general practitioner, and explained to him about the chip of paint getting into his eye. Upon examination of the eye the doctor found it red and inflamed, as is usual when there has been irritation by a foreign body; he diagnosed the condition as acute conjunctivitis—a term used to designate an inflammation of the conjunctiva or outer coat of the eye—which ordinarily clears up in two to four days, and gave the proper treatment for such condition. In addition, he recommended that plaintiff be relieved from duty, which was done. About four o'clock that afternoon the ship arrived in Honolulu, on its way from the Orient to San Francisco, California, and after it had docked, plaintiff went to the Marine Hospital there, but upon finding it closed proceeded to the Queen's Hospital in the same city, where he saw a Dr. Yap, whom plaintiff refers to as a "competent physician". That doctor, after making a thorough examination, diagnosed the condition as "acute traumatic conjunctivitis", and treated the eye in the same manner as had Dr. Lewis earlier in the day. Plaintiff then returned to the "President Taft", where he was placed in the ship's hospital by the orderly on duty. At about eleven-thirty o'clock that same evening, when Dr. Lewis came back aboard, approximately a half hour before the ship departed for San Francisco, as per schedule, he visited plaintiff, who claims that he then told Dr. Lewis that Dr. Yap had advised shore hospitalization. Plaintiff testified further that he told Dr. Lewis that he preferred to go to San Francisco; that when he inquired about the advisability of so doing, the doctor answered that there was no danger; and that he then agreed to make the journey. The ship's doctor testified that he had no recollection of any such conversation with DeZon, and expressed doubt as to whether it had taken place. At any rate, a bed in the ship's hospital and surgery was assigned to plaintiff, where he remained during the five-day voyage to San Francisco, upon arrival at which port he was taken to the United States Marine Hospital there. While hospitalized aboard the ship, he was served all his meals in bed, was visited and treated by the ship's doctor several times a day, was given almost constant attention by the ship's male nurse, and was given the treatment deemed appropriate by the ship's doctor, the [fol. 3] physician at Honolulu, and an army surgeon with extensive experience in the Orient with eye infections, who

was aboard ship and was called into consultation by the ship's doctor. Plaintiff's condition did not improve, but grew worse. Eye specialists at the Marine Hospital in San Francisco conducted extensive examinations, and after five days determined that plaintiff was suffering, not from acute conjunctivitis, but from intraocular hemorrhage. The eye failed to respond to the treatment rendered at said hospital, and on July 5, 1940, the organ was enucleated.

Plaintiff called as a witness Dr. Percival E. Faed, a physician at the United States Marine Hospital in San Francisco, who had attended DeZon most of the time that he was in said hospital and had removed his eye. This witness testified concerning the manner in which plaintiff's eye was treated while at that hospital (which varied from that administered to plaintiff aboard ship), and stated that in his judgment similar treatment should have been given to DeZon when he first reported to Dr. Lewis, because such treatment might "possibly" have helped plaintiff's condition. When asked whether DeZon should have been hospitalized on June 3 or 4, 1940, when the ship was at Hawaii, Dr. Faed said that he would have advised it from what he knew of the case, that "it might have helped some". A witness for defendant, Dr. Jerome Bettman, a specialist in ophthalmology, stated that he believed that the use, at the outset of plaintiff's disorder, of atropine, a drug employed for purposes of dilating the eye so as to put the small muscles inside the eye at rest and to prevent adhesions of the iris and lens, which drug was used by the San Francisco Marine Hospital in caring for DeZon and which is not ordinarily carried by the general practitioner, would have aided. He testified further that under the facts and circumstances it was "too much to expect of the average general man to be certain that this case is or is not serious, or to be certain of the diagnosis within a relatively short time", but that because there was no special eye equipment on the ship and all facilities were available at the Honolulu hospital, he "as a specialist, would have referred him [DeZon] to the hospital".

Plaintiff's case is based, in particular, upon a consideration of the matter set out in the paragraph next above. He phrases his contention in these words:

[fol. 4] "The failure to leave DeZon in Honolulu under these facts constitutes a clear case of negligent failure to

provide proper medical care, however the case may be viewed."

Preliminarily to instructing the jury on defendant's motion for a directed verdict, the court, in discussing the matter with counsel, remarked:

"Now, from what was placed before me in regard to the treatment of the man I don't see any criticism on it. The only adverse testimony that appears on that that I recall is that of this doctor [Dr. Faed] that was in the Government Service, here, and that doctor, of course, did testify to this effect: He said he didn't know whether it would benefit him or not benefit him, but the very fact that he didn't know—in other words, that the balance was so equal he thought he would give the advantage to the man and not let him go with the ship. But that much testimony would not establish the fact that the doctor, in his administration of his functions as a doctor, was acting negligently."

And afterwards, when addressing the jury, he remarked that: "A mistake of a doctor, even, in the pursuit of his profession, is not necessarily negligence". Then, after summing up the evidence, he concluded:

"Now, can you read in that that a doctor employed by the company by having a view one way or the other was negligent unless he didn't follow the view he thought was necessary? There are other features in the case, but I could not find negligence, something that you can condemn as should not have [been] done by a man of the profession, so as to bring the responsibility of that negligence home to the company, and therefore I am going to instruct you at this time that you retired to the jury room and return a verdict in this case in favor of the defendant."

Here on appeal plaintiff argues that "The verdict is contrary to the evidence in that taking the case in the most favorable light to appellant, as must be done since the verdict was directed against him, there was sufficient evidence upon which the jury could have found for appellant".

[fol. 5] Very recently, in the case of *Deere v. Southern Pac. Co.*, 123 F. 2d 438, this court had occasion to discuss the propriety of a Federal trial court's action in granting a

motion for a directed verdict. The following excerpt is taken from that opinion (p. 440):

“The test as to whether a directed verdict should be granted, is not whether the evidence brings conviction in the mind of the trial judge; it is whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.” O’Brien, *Manual of Federal Appellate Procedure*, 3d Ed., p. 15. Respecting the power of the trial court to grant or deny a motion for directed verdict the Supreme Court of the United States stated in *Gunning v. Cooley*, 281 U. S. 90, 91, 50 S. Ct. 231, 233, 74 L. Ed. 720, as follows:

“When on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.” *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 369, 33 S. Ct. 523, 525, 57 L. Ed. 879 [Ann. Cas. 1914D, 1029].

“A mere scintilla of evidence is not enough to require the submission of an issue to the jury. * * *”

As mentioned at the beginning of this opinion, this action is brought under the Jones Act (41 Stat. 1007, 46 U. S. C. A. § 688). So far as material to this case it reads:

“Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply: * * *”

The construction of this statute was involved in *Cortes v. Baltimore Insular*, *supra* (287 U. S. 367). Speaking for the court, Justice Cardozo said (pp. 377-378):

[fol. 6] “The act for the protection of railroad employees does not define negligence. It leaves that definition to be

filled in by the general rules of law applicable to the conditions in which a casualty occurs. * * * Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i. e.; imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail."

"As is the case with railway workers on interstate lines under the provisions of the Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. A. §§ 51-59), Congress has, by the Jones Act, afforded seamen "a modified common law remedy for negligent injury, and the modifications were in favor of the employee, in that the fellow-servant or common employment defense was done away with, the assumption of risk defense was much weakened, and the contributory negligence rule was so modified that it usually results only in a reduction of the recovery, on the basis of comparative negligence". 4 Benedict on Admiralty (6th ed.) § 612, p. 196.

We are reminded by plaintiff that this Act "is to be liberally construed, in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings" (*Cortes v. Baltimore Insular Line*, supra (287 U. S. 367, 373)), but we must also be mindful of the fact that although the Jones Act has given "a cause of action to the seaman who has suffered personal injury through the negligence of his employer" (*ibid.* 372), still it does not make that negligence which was not negligence before, does not make the employer responsible for acts or things which do not constitute a breach of duty. "A seaman is not entitled to compensation or indemnity in the way of consequential damages for disabilities or effects occasioned by the sickness or injury, except in case of negligence". 24 R. C. L. § 218, p. 1164.

Returning now to plaintiff's allegation that defendant failed in its duty of rendering proper medical care to plaintiff [fol. 7] till in that it did not hospitalize plaintiff ashore at

Honolulu, we shall first determine the extent of defendant's duty to furnish plaintiff with medical attention and then inquire whether that duty was properly discharged.

In 56 C. J. 1070, § 594, it is said:

"The employer is under a duty to use reasonable care and diligence in providing a physician or surgeon competent to treat the disability incurred. But where not derelict in its duty of care and diligence in the selection of a physician or surgeon, the employer will not be responsible for damages resulting from his incompetence, negligence, nor error in professional judgment, such as a mistake in diagnosis."

In the case of *The C. S. Holmes*, 209 F. 970, 974, we find this language:

"* * * The duty [of the owner to furnish medical care] is one which arises out of and is governed by the circumstances of each particular case, and it is only for the negligence of the owner himself, or the owner's representative, the master, that the vessel can be held. The master is not negligent when he exercises reasonable care in selecting and employs a regularly licensed physician, believing him to be competent, and intrusts the injured seaman to his care, in the belief that such physician will render careful and competent treatment."

Dr. Rodney Yoell, chief surgeon for defendant, testified that he interviewed Dr. Lewis before he was engaged by defendant; that he was satisfied with the results of the interview; that he learned that Dr. Lewis graduated from a recognized medical school; that he checked the official list of doctors licensed to practice in California and ascertained that he held an active license to practice in that state; and that as a result of inquiries concerning Dr. Lewis's reputation, he determined that he was a man of good character. There is no allegation that defendant was negligent in making its selection, nor is there any evidence showing negligence in that respect. Further, no showing has been made that subsequent to taking Dr. Lewis into its employ, defendant became chargeable with knowledge that he was incompetent, if such were the fact. Therefore, it must be taken as established that due care and diligence were exercised by defendant to employ and retain in its service a competent

[fol. 8] physician. As was stated by this court in the case of *The Korea Maru*, 254 F. 397, 399:

*** with respect to the charge that the physician and surgeon was incompetent and unskillful in the treatment of Onjito Itokazu we are of the opinion that the vessel was only liable when the claimant failed to take reasonable care in the employment of such an officer on board the vessel. *Hutchins v. American Steamship Great Northern*, 251 Fed. 826, — C. C. A. —. It is not charged in either of the libels or the amendments that the claimant was negligent in the selection of, or in the employment of, the physician and surgeon, or that his incompetency or lack of skill, as charged, was known to the claimant at the time of his engagement, or that his incompetency and lack of skill, as charged, was subsequently ascertained by the claimant, and that with such knowledge he was retained as an employe of the vessel. In the absence of such a charge, and competent evidence to sustain it, we pass over the evidence relating to the lack of skill and competency on the part of the physician and surgeon in the treatment of Onjito Itokazu."

Also, we find nothing in the record to indicate that defendant did not maintain a properly equipped ship's hospital, that is, with reference to reasonable standards.

If, as a matter of fact, the ship's doctor should have recommended to the master of the ship that DeZon be hospitalized ashore at Honolulu, as contended for by plaintiff, the most that can be predicated of this alleged failure upon the part of the doctor is that it was the result of a misjudgment. Because the shipowner exercised the proper degree of care in selecting said doctor, no responsibility attaches for his errors in judgment. We quote the following:

"On board was a competent ship's physician. For his negligence the defendant was not responsible. Upon his advice, received in good faith, the master might rely. Upon it the master might act. So acting, no liability can be predicated upon error or mistake." *Leone v. Booth S. S. Co.*, 133 N. E. 439 (N. Y.).

Even if, in some way or other, the conduct of the doctor could be said to be attributable to the defendant so that it would be answerable therefor, still no case of actionable

[fol. 9] negligence is established, no case is made out for the jury. To demonstrate that this is so we need not give a detailed discussion of the matter; a reference back to the trial court's analysis of the relevant evidence, as hereinbefore set out, is sufficient.

Because the expert testimony was to the effect that hospitalization at Honolulu "might have helped some", we believe the following quotation pertinent:

"* * * The charge made against the ship's surgeon is that, there being a possibility of a fracture of the nose, which could not be detected at the time, he should have sent the libellant to a hospital at Southampton for expert treatment. I think this would be an error of judgment on his part for which the shipowner would not be liable. Besides, there is no evidence that if he had been left at Southampton the treatment there would have been different from what he received on board, or that a better result would have ensued. * * *"
Geistlinger v. International Mercantile Marine Co., 295 F. 176.

Plaintiff relies upon *Leone v. Booth S.S. Co.*, supra (133 N. E. 439), as being authority for his contention that the instant case should have gone to the jury. As is shown by the hereinabove-quoted excerpt from that opinion, the court recognized that the shipowner is not liable for negligence or misjudgment if the master places reliance upon the judgment and competency of a carefully selected ship's physician, to whose custody and care a seaman has been committed. The reason for the court's holding there that a case for the jury had been made out was this: the evidence showed that the master had not followed the recommendations of the ship's doctor, but instead, in the exercise of his own independent judgment, had acted contrary thereto. The instant case is distinguishable in that the plaintiff was in the hands of a carefully selected ship's physician, and there was no interference by the master with regard to what treatment or care was proper for the plaintiff.

The *Korea Maru*, supra (254 F. 397), is also cited by plaintiff as support for his contention. Recovery in that case was permitted, not because the ship's doctor erred in judgment or negligently treated the claimants, but because he totally neglected to give them treatment. We do not have that situation before us. The evidence conclusively

[fol. 10] shows that the doctor was very attentive in ministering to plaintiff. Moreover, the doctor's testimony that he had treated plaintiff to the best of his ability was not questioned.

The other cases cited by plaintiff for the purpose of proving his contention that he should have been given shore hospitalization immediately are not in point. The distinction lies in the factual situations presented. Most of them involve instances in which there was no ship's physician aboard or in which the master failed to follow instructions given by a physician.

In his endeavor to establish a case of negligence for which defendant was liable, plaintiff contends that the fact that Dr. Lewis was away from the ship while it was docked at Honolulu and did not return until about a half hour before sailing time, "until it was *almost* too late for the ship to put plaintiff ashore" (emphasis supplied), is evidence of negligent failure to render medical care. The very language of the contention serves to refute it; for it contains the implicit admission that there was still sufficient time to place plaintiff in a shore hospital had the doctor deemed that action advisable.

"The gravamen of a Jones Act suit is the negligence of the employer of the plaintiff-seaman, and such negligence must be alleged and proved." 4 Benedict on Admiralty § 612, p. 202. That burden plaintiff has failed to sustain.

The conclusion is that there is no evidence whatever from which the jury would have been warranted in finding a verdict for the plaintiff, and the directing of a verdict for the defendant was therefore correct.

Judgment affirmed.

CONCURRING OPINION

HEALY, C. J., Concurring;

I concur in the affirmance on the ground that the showing of want of due care on the part of the ship's doctor was insufficient to warrant submission of the case to the jury.

[File endorsement omitted.]

[fol. 11] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 9, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3192)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 436

JOSEPH DE ZON,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD., A CORPORATION.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.**

BRIEF FOR PETITIONER.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 436

JOSEPH DE ZON,

vs.

Petitioner,

AMERICAN PRESIDENT LINES, LTD., A CORPORATION.

BRIEF FOR PETITIONER.

On certiorari to the Circuit Court of Appeals for the Ninth Circuit to review the decision of that Court on July 3, 1942 (R. 1-10) ¹ affirming a judgment of the District Court for the Northern District of California, Southern Division, entered on July 30, 1941 (R. 166) ² granting a directed verdict to respondent in an action by petitioner under the Jones Act to recover damages for personal injuries.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 129 F. (2d) 404 (R. 1-10).³ There was no opinion by the District Court.

¹ Printed record.

² Typewritten record.

³ Printed record.

II.

Jurisdiction.

1. Petitioner's action was brought under the Jones Act (Act of June 5th, 1920, Ch. 250, Sec. 33; 41 Stat. 1007; 46 U. S. C. A. 688). This Court's jurisdiction rests on Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

2. The petition for certiorari was filed October 2, 1942 and granted November 9, 1942 (R. 11).⁴

III.

Statement.

Petitioner brought an action under the Jones Act (Act of June 5th, 1920, Ch. 250, Sec. 33; 41 Stat. 1007; 46 U. S. C. A. 688) in which he alleged that while employed as a seaman aboard the respondent's vessel S. S. "President Taft", and in the course of his duties while chipping and painting in the boiler room of said vessel on June 3, 1940, a scale of paint flew into his right eye and immediately thereafter he got paint in his eye. That on the following day, the vessel docked at Honolulu, T. H., and petitioner's eye was examined by a competent physician in Honolulu and a diagnosis of acute traumatic conjunctivitis made and immediate hospitalization advised by said physician. That said physician requested petitioner to consult the ship's physician before becoming a patient at the hospital.

That on June 4 petitioner consulted the ship's physician, whom petitioner alleged was then and there respondent's agent, and advised said ship's physician of the examination made by the Honolulu physician and requested instructions of the ship's physician whether petitioner should stay

⁴ Printed record.

aboard or remain in Honolulu. That the ship's physician instructed petitioner to remain aboard and adequate medical care would be supplied in San Francisco. That petitioner followed the ship's physician's directions and remained aboard the vessel, and became a patient in the San Francisco Marine Hospital from June 10, 1940 to July 22, 1940.

Petitioner further complained that respondent negligently and carelessly failed and refused to provide petitioner with adequate and sufficient medical care and attention from June 4, 1940 to June 10, 1940 with the result that the infection to petitioner's right eye grew steadily worse until on July 5, 1940 it was necessary to remove the eye. That respondent had the ability to provide petitioner with adequate medical attention when the vessel was at Honolulu.

Petitioner prayed for general damages in the sum of \$25,000.00 and for damages resulting from loss of wages at the rate of \$80.00 monthly from June 10, 1940 until October 15, 1940. (The complaint is at R. 1-4.)⁵

Respondent answered and admitted that petitioner was employed as a seaman aboard respondent's vessel S. S. "President Taft" during the times stated by petitioner. Admitted that the vessel was docked at Honolulu on June 4, 1940 and that petitioner consulted the ship's physician. Admitted that petitioner remained aboard said vessel when she left Honolulu and became a patient at the Marine Hospital from June 10, 1940 to July 22, 1940. Admitted that the petitioner's right eye was removed on July 5, 1940. Respondent denied petitioner's remaining allegations. (The answer is at R. 5-7.)

Respondent at first admitted that the ship's physician was "then and there the agent and employee of respondent

⁵ This and all further references unless otherwise noted are to the typewritten record.

corporation" but subsequently on Motion (R. 8) and Order of Court (R. 9) struck said admission from its answer (R. 10).

The case went to trial before a jury on July 29, 1941, the Hon. Harold Louderback presiding.

At the trial, as will appear from a reference to the abstract of facts hereinafter set forth, petitioner established by substantial evidence that respondent American President Lines, Ltd. negligently failed and refused to provide him with proper medical care, failed to leave him at a properly equipped hospital with eye specialists there in attendance, which were then and there available at Honolulu, T. H., and that by keeping petitioner aboard ship where expert care and facilities were not available, and by taking petitioner back to the mainland petitioner was caused to and he did lose the sight of his right eye.

After all the evidence was in, respondent made a motion for a directed verdict which was granted by the District Court, a judgment on instructed verdict was entered on July 30, 1941 (R. 165).

Thereafter petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and that Court affirmed the judgment on July 3, 1942, Judges Carrecht and Fee concurring on the majority opinion, and Judge Healy writing a separate concurring opinion.

It is the petitioner's contention that the Trial Court erred in taking the case away from the jury, thereby effectively denying petitioner a trial by jury and depriving him of his substantive right to obtain redress by way of damages under the Jones Act for respondent's negligent failure to provide petitioner with proper medical care which resulted in the loss of petitioner's right eye, and that the decision of the Circuit Court was likewise in error.

IV.

Basic Questions Involved.

1. Whether under the facts of the case the Court below erred in taking the case away from the jury on respondent's motion for an instructed verdict, and whether by such action the Trial Court effectively deprived petitioner of his fundamental right to a trial by jury under the Jones Act.

2. Whether under the facts of the case, and in taking the case away from the jury the Trial Court effectively denied petitioner of his right to maintain an action for damages for personal injuries under the Jones Act based upon respondent shipowner's negligent failure to provide proper medical treatment resulting in petitioner's loss of vision in his right eye.

3. Whether a shipowner which employs a licensed physician aboard ship is liable in damages under the Jones Act for the failure of said physician to leave an injured seaman at a port where first class hospital facilities and specialists are available for treatment to the seaman, the vessel then being docked at such a port, or whether the physician's action in keeping the seaman aboard the vessel and returning him to the home port several thousand miles away is merely a mistake in judgment for which the shipowner is not liable.

4. Whether a shipowner which employs a licensed physician is liable in damages under the Jones Act for the negligence of said physician in causing personal injuries to a seaman employed aboard said shipowner's vessel.

V.

The Facts.

Since we seek relief from a Judgment on Instructed Verdict for respondent, we will present and argue from the

facts as they are established in the light most favorable to petitioner.⁶

A. PETITIONER'S CASE.

Petitioner Joseph DeZon testified that in April 1940 he signed on the S. S. "President Taft" as a marine fireman, whose duties are to care for and maintain the fire-room and boilers (R. 13). That on June 3, 1940 while the vessel was at sea he was scraping the side of a boiler and repainting it with aluminum paint. That he chipped paint with one hand and had a paint brush in the other hand, and that while he chipped something went into his right eye; that he started to get up, and hit his head against a pipe; that the paint brush hit his face; and that he had to leave his station to go to his quarters in order to wash his eye (R. 14). That he notified the men in the fire-room before he left his station (R. 14) and that he notified the Second Engineer Mr. Bangs on his return that he had something the matter with his eye (R. 15).

DeZon testified that he followed the instructions of any licensed officer on the vessel; that any licensed officer was his superior (R. 16).

Petitioner stood his 8:30 p. m. watch on June 3, 1940 but "I didn't feel so good so my partner worked for me" (R. 17). When he arose at 7:00 o'clock the morning of June 4, his eye seemed to "pain and hurt" him, so he saw the ship's physician at 7:30 that morning who washed his eye, put some salve in it, bandaged it, and told DeZon not to turn-to, and to notify the engineers that he was relieved from duty, which he did (R. 17). The ship's physician told DeZon on this occasion, "The eye looks pretty bad" (R. 18).

The vessel arrived at Honolulu on June 4, 1940 at about the hour of 4:00 p. m. and at that time the ship's physician

⁶ Empire State Cattle Co. v. Atchison, Topeka, etc. Ry., 210 U. S. 1.

gave DeZon a "hospital slip to go to shore" (R. 19). The U. S. Public Health Service was closed when DeZon arrived ashore, so he went to Queen's Hospital and there was examined by Dr. Yap (R. 20).

Dr. Yap advised DeZon "to get off the ship and go to the hospital then", "to get off the ship as soon as possible", and to notify the ship's doctor that he had to go into the Queen's Hospital (R. 20). DeZon returned to the vessel, arriving there at about 6:00 p. m. *but the ship's doctor was ashore* (R. 20, our emphasis). DeZon didn't feel so well so the orderly put him to bed in the "ship's bay" and told him to wait there until the doctor came aboard (R. 20).

The ship's doctor returned to the vessel at 11:30 p. m. with the vessel scheduled to sail at 12:00 o'clock midnight (R. 21). *DeZon told the ship's doctor that Dr. Yap advised hospitalization at Honolulu, that it was a "pretty bad eye", and that he was "taking a chance if he sailed", and DeZon needed the ship doctor's permission to go ashore* (R. 21). That the ship's doctor replied, "Well, if you want to take a chance or a gamble on it, you can go to the States. It don't look so bad. It can be all right." DeZon replied, "You are the doctor; you are the boss; if you want to, let's go" (R. 21, our emphasis).

And, along the same line, this important testimony: (R. 64-65)

Q. (By Mr. Resner, petitioner's attorney) "When you returned and talked to the ship's doctor, did you give him a complete report of everything that transpired at Queen's Hospital?"

A. (By DeZon) "Well, as I said, by the time the ship's doctor got to me—I reported back to the ship as soon as I left the Queen's Hospital, pretty close to six o'clock—well, the time he got aboard it was 11:30. By that time I was in bed in the ship's hospital, sick, pretty much under the

weather, and I told him everything that was told to me there."

Q. "Which was what?"

A. "*That if I made the trip I am taking a chance on losing my eye. Well, that is it. Well, he looked at it again. Well, he had his opinion as to whether we should go to San Francisco or not*" (Our emphasis).

Q. "And you followed his advice?"

A. "Well, he is the superior officer. He said, 'Take a chance.' I feel he is an accredited physician." (Our emphasis)

Q. "Therefore, you followed what he suggested and returned to San Francisco, is that correct?"

A. "Yes, yes".

The vessel sailed for San Francisco at midnight June 4, 1940 (R. 22). The eye began to get more and more blood-shot, to tear, to swell, and to pain, the pain extending into the head, and DeZon became faint (R. 59). DeZon remained in the ship's hospital all the way to San Francisco, not doing any work (R. 60). The ship's doctor gave DeZon sedatives to sleep and boric acid washing for the eye, but the pills did no good, and the eye grew progressively worse, and DeZon had a steadily increasing "throbbing pain" (R. 60). The ship's doctor consulted a Navy doctor who was a passenger but DeZon did not get any useful treatment as a result of this (R. 61).

The vessel arrived in San Francisco on the morning of June 10, 1940 and DeZon was removed to the Marine Hospital by ambulance (R. 61). DeZon's right eye was enucleated or removed on July 5, 1940 (R. 62). DeZon remained in the hospital until July 22, 1940, and finally returned to work on October 8, 1940. DeZon testified that he earned no wages from June 10, 1940 to October 8, 1940; that his cash wages, including overtime and bonus were \$130 to \$140 per month.

Petitioner introduced as his Exhibit No. 3 (R. 59) a report from the Honolulu Hospital, as follows:

"3304 (COPY) C. & C. Emergency. Name, DeZon, Joseph.

Nationality, Caucasian.

Address, S. S. "President Taft".

Sex, Male, Age 36.

In June 4, 1940, 4:34 p. m.

Findings: Acute traumatic conjunctivitis, O. D.

Treatment: Boric wash. Yellow Oxide. Eye pad.

Disposition: Advised hospitalization.

Brought in by self.

Remarks: To consult ship's doctor before going to hospital.

Signed: R. Yap, M. D."

Petitioner called as a witness Percival Elmer Faed, M. D., physician at the United States Marine Hospital in San Francisco, during June-July of 1940. Dr. Faed brought with him the hospital's records on DeZon which were introduced in evidence as petitioner's Exhibit No. 1 (R. 23).

On June 15, 1940 the Marine Hospital diagnosis on DeZon was "*Hemorrhage, anterior chamber, right eye, traumatic*" (R. 25), which meant that DeZon had blood and inflammation in his right eye and that it was due to injury (R. 25). On July 5, the eye was removed by Dr. Faed. (R. 27, our emphasis.)

The Marine Hospital records show a report by Dr. Kidd (then at the hospital) of June 11, 1940 which gives the impression that DeZon was suffering from "1. Pan ophthalmitis; 2. Beginning sympathetic ophthalmitis; 3. Irido Cyclitis."

These were explained by Dr. Faed as follows: "The first one is pan ophthalmitis. It is an inflammation involving the whole of the right eye. All the structure of the right eye. The second, 'Beginning sympathetic ophthalmia', is

an inflammation in the eye which is due to injury, sometimes affects the other eye, and there was some suspicion the other eye might have been affected there" (R. 31).

And this testimony: (R. 31-32)

Q. (Mr. Resner) "On these impressions you note here, Doctor, could you give us your opinion as to what caused that impression to be made?"

.

A. (Dr. Faed) "The basis was the appearance of the eye. It was painful."

Q. "And the cause?"

A. "And the cause was stated at that time to be due to some injury."

Q. (The Court) "Would that explanation be consistent with what was found in the eye?"

.

A. "Oh, yes, it appeared to be that."

Concerning treatment, there was this testimony: (R. 34)

Q. (Mr. Resner) "Now, with respect to treatment, would you read that, Doctor?"

A. (Dr. Faed) "Treatment:" the first part is "Pontocaine, $\frac{1}{2}\%$, Second, 'Atropine, 1%, Ointment, applied.' Third, 'Hot B. A.—or boric acid. Fourth, 'Atropine solution 1%, in right eye three times a day.' Fifth, 'Typhoid toxin tomorrow afternoon, and omit lunch.' Sixth, 'Send to dental clinic tomorrow a. m. for elimination of foci of infection.' Seventh, 'Emarin Codein compound, tablets 2 for pain as required.' Eighth, 'Pontocaine $\frac{1}{2}\%$, two drops in right eye for pain as required.' Ninth, 'Seconal—which is a sleeping powder—'grains 1-1 $\frac{1}{2}$ at bedtime as required.' Tenth, 'C. B. C.'—which means complete blood count—

• • • The next is dated under 6/11/40, which is the following day: 'Postpone typhoid vaccine until tomorrow morning; omit breakfast.' "

Q. "Now, with regard to the treatment which was given to Mr. DeZon, as indicated by the notes which you have just read, what was the purpose of the treatment? What was it designed to do?"

A. "It was to alleviate his pain and to treat the eye, possibly reduce the hemorrhage in it."

Then, with respect to whether DeZon should have received the kind of treatment he received at the Marine Hospital at an earlier date, Dr. Faed testified, "*I think he should have had some treatment similar to that at an earlier date.*" (R. 50, our emphasis)

and this (R. 50):

Q. (Mr. Resner) "Well, then, do you feel, however, that this treatment that the Marine Hospital in San Francisco gave on June 10th and following should have been given on June 4th and following, is that correct?"

A. (Dr. Faed) "*I should judge so.*" (Our emphasis)

With respect to whether hospitalization would have helped DeZon, there was this testimony: (R. 51-53)

Q. Mr. (Resner) • • • "From your observation of Mr. DeZon in the hospital, and your history of the case, and the diagnosis as made, and your observations, and all the facts and circumstances surrounding this case, can you give me your opinion as to whether Mr. DeZon should have been hospitalized on June 3rd and 4th, when this trouble to the eye first occurred?"

A. (Dr. Faed) "*I believe he should have been hospitalized; it might have helped some.*" (Our emphasis)

• • • • •

Q. . . . "Would it have been your instruction to hospitalize him at the time this trouble to the eye developed on June 4th?"

A. *"I think I would have advised it from what I know of the records"* (Our emphasis).

B. RESPONDENT'S CASE.

Dr. Will Lewis, ship's doctor on the S. S. "President Taft" testified that he went to Cooper Medical College and graduated from the University of Southern California in 1907, interned at Cedars Hospital, Los Angeles, and went into private practice in Santa Barbara County; served in the war, practiced in Ventura until 1929 and "was forced to retire on account of an accident" he had (R. 96).

That he joined the American President Lines in April 1940 and was employed on the "Taft" as ship's surgeon during two trips in 1940. That DeZon came to see him the morning of the date the vessel arrived in Honolulu "with paint in his right eye" (R. 98) and that DeZon "had an irritation due to some foreign body in the eye, which he said was paint. He was given an eye dressing and returned to quarters on that day" (R. 99). The eye was "red and inflamed as always is the condition when there has been a foreign body in it irritating it" (R. 99).

Dr. Lewis testified that he never made a specialty of ophthalmology, and had never done any eye surgery, refractory or eye muscle work (R. 107). Dr. Lewis admitted he had "no special knowledge of the eye" and that he would refer any unusual or serious eye condition to a specialist, particularly if one were available (R. 108).

Dr. Lewis stated he had no record of referring DeZon to the Marine Hospital at Honolulu but that he would not say that he had not done it (R. 110). That DeZon com-

plained of considerable pain when Dr. Lewis first saw him. That Dr. Lewis returned to the vessel about a half hour before the ship sailed and found DeZon in surgery (R. 110) but that he recalled no conversation with DeZon.

Dr. Lewis admitted that a hemorrhage in anyone's eye was a very serious matter which could cause the loss of an eye (R. 112).

The vessel had no eye specialty equipment and no effort was made to procure any at Honolulu (R. 117).

Dr. Lewis stated that it was possible that he gave De Zon a master's certificate to the Marine Hospital at Honolulu because those hospitals do not ordinarily take seamen without one, and that possibly he gave De Zon a certificate but that there was no record of it (R. 119). That if he (Dr. Lewis) did send De Zon to the Marine Hospital at Honolulu it was because the doctor believed De Zon was suffering from a condition other than acute conjunctivitis (R. 129).

Dr. Rodney A. Yoell, called by respondent, testified that he was a licensed physician and surgeon and Chief Surgeon for the American President Lines. That he employed Dr. Will Lewis, checked into where Dr. Lewis was educated, when admitted to practice, and that he was licensed in California for 1940 and 1941 (R. 124-125).

Petitioner stipulated that the respondent found out that Dr. Lewis was a man of good character so far as character and reputation was concerned (R. 129) but petitioner would not stipulate that Dr. Lewis was a competent surgeon (R. 127, R. 128, line 30).

Dr. Yoell testified that the surgeon aboard ship has no power to command, but that he can make recommendations to the master or deck officer who can carry out the order if they see fit (R. 130). That the master can order the surgeon to see a man and treat a man, and that the master can refuse to put a sick man ashore even though the doctor recommend it (R. 132).

Dr. Yoell testified that his investigation of Dr. Lewis revealed that Dr. Lewis was not an eye specialist, but that he was a general practitioner who had some special training in surgery (R. 132). Dr. Yoell did not check to find out whether Dr. Lewis was licensed in 1938 and 1939 (R. 133).

Dr. Yoell further testified that the ship's doctor's authority is limited to diagnosis and treatment and that all final orders are made by the master (R. 134). If a man is very sick, the doctor and master consult on the case (R. 135); that if a man requests the ship's doctor to put him ashore after going to a hospital or doctor on shore, the ship's doctor has to consult with the master, because the master is the only one who can issue the certificate to put the man ashore (R. 136). That the ship's doctor is subject to the master's orders the same as other personnel of the vessel (R. 136).

Dr. Jerome Bettman, called by respondent, testified that he was an eye specialist (R. 138-139). That he never saw De Zone, didn't see the Marine Hospital Records (except for a clinical abstract stating the diagnosis and a bit more data), and that all he knew about the case was from reading Dr. Lewis' deposition and talking to defense counsel (R. 141).

Dr. Bettman admitted that aluminum paint might be more irritating than ordinary paint; that any paint might be irritating (R. 142). That an eye which got paint in it would become red and irritated, become inflamed (R. 143).

Dr. Bettman stated that *the atropin drug used by the Marine Hospital on De Zon should have been applied at the onset of De Zon's disorder; that it is a drug not ordinarily carried by the general practitioner* (R. 149, our emphasis).

Dr. Bettman stated that "it is a little too much to expect of the average general man to be certain that this case is or is not serious, or to be certain of the diagnosis within a

relatively short time" and that *he, as an eye specialist, with a hospital and eye equipment available, would have referred De Zon to the hospital* (R. 150, our emphasis).

The respondent rested.

The respondent made a motion for an instructed verdict, which the Court granted.

VI.

Specification of Assigned Errors to Be Urged.

1. The verdict is contrary to law in that the District Court, by its ruling in taking the case away from the jury, which ruling was affirmed by the Circuit Court, effectively deprived petitioner seaman of his right to trial by jury under the Jones Act, in an action to recover damages for personal injuries.

2. The verdict is contrary to law in that the District Court, by its ruling in taking the case away from the jury, which ruling was affirmed by the Circuit Court, effectively deprived petitioner seaman of his right to maintain an action for damages under the Jones Act based upon the shipowner's failure to render him proper medical care.

3. The verdict is contrary to law in that ruling in this case the shipowner is relieved from liability in an action under the Jones Act for the negligent failure of the vessel's physician to leave an injured seaman at a port where the vessel is docked and where expert hospital facilities and specialists are available, merely by employing such a physician and setting up the claim that such failure to provide treatment is merely a mistake in judgment on the physician's part for which the shipowner is not liable.

4. The verdict is contrary to law in that under the ruling in this case a shipowner is relieved of liability in an action for damages brought by a seaman under the Jones Act

based upon the negligent treatment or failure to treat by the vessel's physician simply by the fact of employing a licensed physician, whereas the law should impose liability on the shipowner for such negligence.

5. The verdict is contrary to law in that the District Court should have allowed the case to go to the jury under the facts pleaded and proved, and the Circuit Court should have reversed the District Court for this reason.

6. The verdict is contrary to the evidence in that taking the case in the light most favorable to the petitioner, as must be done since the verdict was directed against him, there was sufficient evidence upon which the jury could have found for petitioner.

VII.

Outline of Argument.

There is really only one issue in this case: *The District Court should have allowed this case to go to the jury*, and in failing to do so the District Court effectively deprived petitioner seaman of his right to trial by jury, and the decision of the Circuit Court affirmed the deprivation of petitioner's right of jury trial. Wrapped up with this issue is the further issue that by its ruling, the District Court, affirmed by the Circuit Court, effectively denied and impaired the right of petitioner seaman to maintain an action under the Jones Act on account of the vessel's failure to render proper medical care to petitioner and has relieved the shipowner of liability in a case where the doctor's negligence should be attributed to the shipowner. In other words, under the facts of a case like this, the shipowner should not be relieved of liability merely because it has a licensed doctor aboard. Because of the vessel's negligent failure to render proper medical care and to hospitalize petitioner when first class hospital facilities and eye specialists were available for treatment of petitioner's eye

without any trouble whatsoever to the vessel and its officers, petitioner has permanently lost the sight of his right eye.

We intend to show that the District and Circuit Courts erred:

1. In depriving petitioner of his fundamental right to a jury trial.

2. In their interpretation of the Jones Act in cases based upon failure to render proper medical care.

3. In giving to a remedial statute a narrow and restrictive construction, resulting in a denial of relief which should have been granted.

4. In taking the case away from the jury, where under the facts proved petitioner was entitled to have the jury, not the Court, determine whether proper medical care was or was not given.

5. In deciding that there was not sufficient evidence to take the case to the jury, when in fact there was sufficient evidence upon which the jury could have returned a petitioner's verdict.

VIII.

ARGUMENT.

POINT I.

The ruling of the District Court in taking the case away from the jury, and the Circuit Court's decision in affirming that ruling, effectively deprived petitioner of his fundamental right of a trial by jury.

This court, in a seaman's case arising under the Jones Act, has stated:

Jacob v. The City of New York, — U. S. —, 75 L. Ed. (Adv.) 750.

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of

federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it . . .

"Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury."

"The simple tool doctrine, used by the courts below to bolster their belief that the evidence was insufficient, does not affect our conclusion. In the first place, the contrariety of opinion as to the reasons for and the scope of the simple tool doctrine, and the uncertainty of its application, suggest that it should not apply to cases arising under legislation, such as the Jones Act, designed to enlarge in some measure the rights and remedies of injured employees. But even assuming its applicability, the doctrine does not justify withdrawing this case from the jury. . . ."

"Petitioner inspected the wrench, found it defective and then asked three times for a new one. This satisfied the burden of inspection placed on his shoulders by the doctrine, and it was then for the jury to say whether respondent's failure to comply with those repeated requests was negligence on its part. To deny petitioner the right to have the jury pass on that issue because of the simple tool doctrine is to say that doctrine relieves the master of any duty to furnish reason-

ably safe and suitable simple tools in spite of the fact that he knows they are defective, and requires the servant not only to inspect simple tools for defects, but also to supply his own simple tools when he finds those of the master defective. This is so obvious a perversion of the Jones Act as to require no comment * * * (Our emphasis.)

A substitution of the statements concerning failure to render proper medical care in our case for the reference in the *Jacob Case* to the simple tool doctrine will readily demonstrate that our case is one which the trial court should have permitted the jury to pass upon. It was no more within the province of the trial court in our case to decide that respondent satisfied its duty to provide proper medical care for petitioner by having a licensed doctor aboard than it was for the trial court in the *Jacob Case* to say that the simple tool doctrine absolved respondent there of its duty to provide the seaman with safe and proper tools and appliances.

In our case a reference to the evidence wherein he testified that Dr. Yap instructed him to remain in Honolulu for treatment or else he stood a good chance to lose the sight of his right eye, which petitioner communicated to the ship's doctor; the testimony of Dr. Faed that he would have left petitioner in Honolulu at the hospital there, and the testimony of respondent's own witness, Dr. Bettman, to the same effect, the vessel being docked at Honolulu, will demonstrate that this case is one which should have gone to the jury; and though while close the jury could have found a verdict for petitioner. Instead the trial court summarily took the case away from the jury upon the basis of the trial court's opinion that the ship's doctor had done all that he could do, and the Circuit Court approved that action.

With respect to the Circuit Court's opinion, it fails to tell the whole story. For example, the Circuit Court failed to

state, in its summary of the evidence, that petitioner told the ship's doctor that Dr. Yap at Honolulu advised him that if he did not go into a hospital at Honolulu at once for expert treatment, *he stood a good chance to lose the sight of his right eye*. The Circuit Court states that petitioner told the ship's doctor that he preferred to go to San Francisco. This is not the case. Petitioner went to San Francisco on the instructions of the ship's doctor (R. 21). The Circuit Court then goes on to say that Dr. Lewis, the ship's doctor, had no recollection of such conversation, but it must be remembered that this case has to be considered from the standpoint of the evidence most favorable to petitioner,

The Army doctor aboard the vessel on the way to the mainland performed no useful acts nor did he give treatment to petitioner nor did he make a diagnosis (R. 104). Furthermore it is difficult to see how respondent shipowner can relieve itself from liability which should be imposed by its negligent failure to provide proper medical care to petitioner simply on account of the fortuitous circumstance that an Army doctor happened to be aboard the vessel and looked at petitioner seaman. Such an occurrence after the fact of negligence, that is, after failing to leave petitioner at Honolulu, cannot serve to purge respondent of its negligence at the outset of this case. The fact that the Circuit Court offers this circumstance and states further that the Army doctor had "extensive experience in the Orient with eye infections" (R. 2)⁷ as a reason for affirming the trial court reveals the inherent error in that opinion which is its failure to recognize petitioner's right to jury trial based upon the failure to leave petitioner at Honolulu and not what happened on the vessel on its journey from Honolulu to the mainland.

⁷ Printed Record.

In other words, had the vessel been on the high seas when petitioner was first injured and had the ship's doctor then treated him and called into consultation a doctor who might have been aboard, a quite different situation would have been presented than that which existed here where the vessel was docked when petitioner requested medical care and where proper care was available ashore than could possibly be given on the vessel. In this connection the Circuit Court fails to give proper consideration to the testimony of petitioner that Dr. Yap advised immediate hospitalization ashore or else petitioner stood a good chance to lose the sight of his right eye, which facts were reported to the ship's doctor at that time, and also the testimony of Drs. Faed and Bettman that they would have given petitioner immediate hospitalization ashore since it was available.

In our case it is undisputed that the ship's doctor was absent from the vessel during the critical period of time when petitioner was most seriously in need of attention. Petitioner had returned to the vessel to inform the ship's doctor that he was advised to go into the shore hospital and get his gear and sign off the ship, but the ship's doctor was nowhere to be found having himself gone ashore. When Dr. Lewis returned, he hurriedly looked at petitioner and advised him to return to the mainland. The absence of the ship's doctor during the critical period of time when petitioner should have been carefully examined and some consideration given to Dr. Yap's instruction that petitioner come ashore certainly adds up to a negligent failure on respondent's part to furnish petitioner with proper medical care within the doctrines of

The Korea Maru, 254 Fed. 397,

and

Cortes v. Baltimore Insular Line, 287 U. S. 367.

The Circuit Court's opinion uses our argument that Dr. Lewis did not return to the vessel "until it was almost too late for the ship to put plaintiff ashore" to support its conclusion that the ship's doctor was not negligent. We fail to follow the logic of any such argument. The way we reason from the facts is that the ship's doctor was absent during the critical period when he should have been giving treatment to petitioner but that he still returned to the vessel in sufficient time to put petitioner ashore, and only that, as advised by Dr. Yap. Since time was so short a careful practitioner who wanted to play safe would have put petitioner seaman ashore, but what happened here seems rather obvious to us. Dr. Lewis had returned to the vessel in a hurry, the vessel was about to depart. The doctor probably had some things to do. He made short shrift of petitioner under these circumstances. The facts don't mean that Dr. Lewis gave petitioner's case enough consideration to decide that it was proper to take him to the mainland. The facts mean that Dr. Lewis was in too much of a hurry to give petitioner proper consideration at all.

It should be noted that Judge Healy's separate concurring opinion was based upon the ground that the evidence of want of due care on the part of the ship's doctor was insufficient to warrant submission of the case to the jury. We come to an absolutely contrary view. We think that there was sufficient evidence to send the case to the jury, and we believe that a reference to the abstract of the facts supports our view.

Altogether it is petitioner's contention that the trial court's action effectively deprived him of his fundamental right to trial by jury, and in and of itself this fact is sufficient upon which to order a reversal.

POINT II

The verdict is contrary to law in that the District Court, by its ruling in taking the case away from the jury, affirmed by the Circuit Court, effectively deprived petitioner seaman of his right to maintain an action for damages under the Jones Act predicated upon the shipowner's failure to render him proper medical care.

A. It is settled law that a shipowner's failure to render proper medical care resulting in injury to a seaman is actionable under the Jones Act.

The rule is stated by Mr. Justice Cardozo in
Cortes v. Baltimore Insular Line, supra,

at page 376, as follows:

"The failure to furnish care is a personal injury actionable at the suit of the seaman during his life
• • •"

And at page 371,

"If the failure to give maintenance or cure has caused, or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt."

In the cited case, the seaman Santiago died of pneumonia as a result of the alleged negligent failure of the ship to give him proper medical care.

The vessel must furnish proper medical care:

The Korea Maru, supra;

Noirmolte v. Schooner "Rosemary", (U. S. D. C., Va.)

1925 A. M. C. 791;

Broaters v. States S. S. Co., 1930 A. M. C. 919.

In "*The Korea Maru*" (CCA 9).254 Fed. 398, the shipowner was held liable for the ship doctor's failure to at-

tend one passenger, and for his ignoring another injured passenger, whom he attended only twice, the court finding that the doctor should have attended these injured passengers, and while holding that the question of the skill and competence of the doctor was not actionable as against the vessel, the court did hold:

"With respect to the charge . . . that the physician . . . neglected the libelants, we are of the opinion that such neglect was an element in the general charge of neglect for which the vessel was liable."

That statement is applicable to the facts of our case, and the trial court should have allowed the question of the ship doctor's ignoring petitioner, being away from the ship at the critical time and paying little attention to petitioner when he came aboard, and failing to put petitioner ashore, go to the jury. Those facts were all included in the general allegation of negligence contained in paragraph VIII of the complaint (R. 3) and were more than sufficient to send the case to the jury.

The Circuit Court's statement that the shipowner's only responsibility is to use reasonable care to select a reasonably competent doctor is not the whole story.

In our case, we have more than that; we have the failure to render treatment, the failure to leave petitioner in Honolulu, which is the gravamen of the action; and under the rule of *"The Korea Maru"*, *supra*, such negligence and the failure of the ship's doctor to attend is attributable to the shipowner. The mere fact of a doctor being attached to the vessel cannot excuse the failure to render proper medical care.

And proper care must be furnished within the shortest, most reasonable time possible:

Anelich v. "Arizona", (Wash.) 1935 A. M. C. 1332
(Affirmed 298 U. S. 110, 80 L. Ed. 1075),

where a fisherman was injured aboard the vessel at 8:30 a. m. but was not gotten to a doctor until 10:30 p. m., although it was shown that it was only one hour by airplane from the place of injury to the hospital in Seattle where he was to go, and that plane facilities were available. Held, the jury was warranted in finding that adequate treatment and hospitalization were unreasonably delayed.

To the same effect:

Bennett v. American West African Line, (N. Y.) 1933 A. M. C. 419.

So, also, a vessel must put in to the nearest and most convenient port for an injured seaman where proper facilities and treatment are not available aboard, even though the ship thereby is taken off its course:

Persson v. Gulf Refining Co., (N. Y.) 1934 A. M. C. 559.

where a seaman suffered a corneal ulcer, and while it was held that the seaman had no action based upon negligence causing his condition, he had a right to compensatory damages resulting from the breach of the ship's duty to furnish medical aid with reasonable promptness and where it appeared that the vessel failed to put him into an available marine hospital en route and that he lost his eyesight as a result thereof, a jury's verdict for plaintiff seaman in the amount of \$18,000.00 would not be disturbed.

See also:

Unica v. United States, (U. S. D. C., Ala.) 1923 A. M. C. 455.

where a ship's cook suffered a broken arm and internal injuries from a fall aboard the vessel on passage from Hull to Mobile. The first convenient port was Key West, but the master failed to put in. The vessel continued to Mobile and went into drydock. There was an eight days' delay

after Key West and a six days' delay after arrival at Mobile. The seaman's broken arm had to be rebroken on account of the delay, and the man was a year in the hospital. Held, he was entitled to maintenance, cure and compensatory damages in the sum of \$1500.00.

A helpful case on the matters in issue here is:

Nicolaisen v. Swayne & Hoyt (C. C. A. 5), 70 Fed. (2d) 602,

where a seaman went ashore for medical attention to an injured hand, and brought instructions back to the master from the physician whom he had seen ashore who advised the seaman not to use his hand, which statement the master denied. There was evidence that the seaman had pretty much lost the use of his hand, the seaman claiming that the master had compelled him to work despite the doctor's instructions. Held, for plaintiff seaman, the vessel having failed to furnish the seaman with hospitalization which was available, and with proper care.

Nor need an injured seaman request hospitalization. The master and vessel must furnish it. That is the holding of

Nahmeh v. United States, (U. S. D. C., N. Y.), 1926 A. M. C. 1150,

where a seaman was sent ashore at Lisbon for attention to his injured knee, but due to haste and language difficulties failed to see the doctor. The knee became swollen and he went to bed. The chief engineer thought the seaman was a malingerer and so reported to the master with the result that the master paid him no attention on the return home. The seaman's knee became so bad he could not walk off the ship, and subsequently required an amputation. Held: That the seaman need not have requested hospitalization, as it was the duty of the master and of the ship's officers to find out for themselves what was the trouble and act as

reasonable men in doing what was necessary to care for the injured man. For the master's failure to furnish proper care, treatment and supplies after the seaman's accidental injuries in the service of the ship, the ship is liable.

The principles we have outlined were recognized for years in the maritime law prior to the enactment of the Jones Act, and the latter statute has enlarged the duties owed by vessel to seaman.

The Iriquois, 194 U. S. 240.

Cortes v. Baltimore Insular Line, *supra*.

B. *The Jones Act must be liberally construed.*

As is the case with all remedial statutes, the Jones Act must be liberally construed. As stated in:

Torgerson v. Hutton (N. Y.) 1935 A. M. C. 195,

"The Jones Act, a law to promote social justice, should be given a liberal interpretation. All reasonable inferences must be made to support the plaintiff's claim, and all conflicts and doubts resolved in his favor."

Mr. Justice Cardoza noted this principle in:

"This court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings. . . . This court has said that 'the ancient characterization of seamen as "awards of admiralty" is even more accurate now than it was formerly.' . . . Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection."

It would follow that the construction and application of the Act to be followed by the Court is that which would give to petitioner seaman's case its full weight and support a recovery where it is possible to allow one.

C. *The District Court failed to apply the cited cases and principles to the case at bar with the result that petitioner was effectively denied relief to which he was entitled, and in which the Jones Act was nullified insofar as an action based upon failure to render proper medical care is concerned.*

In this case, respondent shipowner seeks to avoid liability upon the contention that the only duty the law imposes upon the vessel is to supply a licensed, competent doctor, and that having done that, its duty to the seaman is discharged; that the vessel and its owners are not liable for errors of diagnosis or treatment made or rendered by the doctor (R. 126-127, page 180).

The trial court granted the motion for an instructed verdict, but seemingly upon a different ground, namely, the court determined that the ship's doctor was not negligent so as to bring the responsibility home to the company (R. 156-158).

However, let us consider the facts as they appear in the light most favorable to petitioner. As noted by our narrative of facts, these facts appear:

1. Petitioner was struck in the right eye. This matter was brought immediately to the knowledge of the vessel when DeZon notified Bangs, the Second Engineer. There was negligence here, in Bangs' not immediately sending DeZon to the doctor and notifying the master. Instead Bangs, and through him, the vessel, ignored DeZon. There was here a failure to render medical care within the meaning of

Nahmeki v. United States, supra.

2. DeZon reported on his own to the doctor the following morning for treatment and the doctor advised him to refrain from work. That was recognition of the fact that

the injury had serious possibilities. Yet, the doctor paid no particular attention to DeZon at that time, or later—until the injury became obviously very critical.

3. DeZon went ashore, where the shore physician Dr. Yap advised him to get off the ship for immediate hospitalization or he stood a good chance of losing his right eye. This matter was reported to the ship's doctor by DeZon which is notice to the vessel, under the respondent's evidence that the master is in complete charge, even over the doctor, and that the doctor makes up a daily report which goes to the master. Even under this situation, with eye specialists and all necessary medical and hospital facilities available in Honolulu; respondent failed to put DeZon ashore. The ship's doctor ignored the instructions of Dr. Yap. The ship had no special equipment to care for an eye condition, and the ship's doctor was admittedly not an eye specialist. *The failure to leave DeZon in Honolulu under these facts constitutes a clear case of negligent failure to provide proper medical care, however the case may be viewed.*

Certainly if a vessel is held liable for failure to put in,

The Iriquois, supra,

Persson v. Gulf Refining Co., supra,

Unica v. United States, supra.

and failing to render care within a reasonable time,

Anelich v. "Arizona", supra,

it must be held liable where hospital facilities ashore are immediately available without any trouble, effort, cost or inconvenience whatsoever to the vessel, and the vessel fails to put the seaman ashore, but instead takes him on a three thousand mile journey with a serious eye condition.

4. DeZon returned to the vessel at about 6:00 p. m. The ship's doctor did not return until a half hour before sailing

time, some five and one-half hours later. *During this critical period, there was a complete absence of medical care on the part of the vessel.* Under any view of the law, this is negligence.

5. Both Dr. Faed (R. 11) and respondent's witness Dr. Bettman (R. 15), testified that they would have hospitalized DeZon in Honolulu, and that the treatment he received in the San Francisco hospital, which would have been available at Honolulu, would have helped if given to him sooner, particularly the application of atropine, which the ordinary physician does not carry with him (R. 149). Under these facts, the case is very much like

Nahmeh v. United States, supra,

and

Nicolaisen v. Swayne & Hoyt, supra;

where the injured seamen should have been rendered medical care while their respective vessels were in port.

It was negligence to fail to leave DeZon in Honolulu, and in going to the mainland, DeZon followed the orders of the physician, whom he considered a superior officer—and speaking for the ship's master.

6. Dr. Lewis, the ship's doctor, admittedly was not an eye specialist. All the respondent proved was that Dr. Lewis was licensed to practice in California in 1940 and 1941 (with the latter year we are not concerned). The company failed to find out whether Dr. Lewis was licensed in the years immediately preceding 1940. He testified that he had been disabled and forced to give up private practice. Respondent did not prove Dr. Lewis' competency—and that cannot be presumed from the fact that he was licensed. Petitioner stipulated that Dr. Lewis was a man of good personal reputation, but that has nothing to do with professional competency (R. 125-129).

Dr. Lewis did not remember, nor did he have a record, of whether he had given DeZon a Master's Certificate to go ashore—yet he admitted it was most unusual for the shore hospital to have admitted DeZon without one. There is no question that DeZon was admitted to the Queen's Hospital. He brought back a card from the Hospital, plaintiff's Exhibit No. 3, as follows:

"5304 (COPY) C. & C. Emergency. Name, DeZon, Joseph. Nationality, Caucasian. Address, S. S. President Taft. Sex, Male. Age, 36. In June 4, 1940, 4:34 P. M. Findings: *Acute traumatic conjunctivitis, O. D.* Treatment: *Boric Wash. Yellow oxide. Eye pad.* Disposition: *Advised hospitalization.* Brought in by self. Remarks: *To consult ship's doctor before going into hospital.* Signed: R. Yap, M.D." (R. 39, our emphasis).

Dr. Lewis did not recall any conversation with DeZon—yet DeZon was very specific about the conversation on the doctor's return to the vessel shortly before sailing. Dr. Lewis told DeZon not to work when the latter first reported with a bad eye, yet failed to leave him in Honolulu even though it was reported to him that the shore doctor had given it as his opinion that DeZon would likely lose the eye if he didn't go into the Honolulu hospital at once. Dr. Lewis was away from the vessel until half an hour before sailing time. Under these facts, is it not reasonable to deduce—and could not the jury have found—that Dr. Lewis was not competent, and didn't pay close enough and proper attention to his business, and to DeZon's bad eye. Even under respondent's theory of the case, these were enough facts to send the case to the jury.

7. On the question of Dr. Lewis' negligence, which the trial court found non-existent, we submit that his failure to leave DeZon ashore when that was advised and reported to him by Dr. Yap (through DeZon) despite his

admission that he did not know much about eye disorders, his absence from the vessel at the critical time, his failure to keep records which indicate a disregard of his duties—are all more than enough from which the jury could have found negligence. Such negligence should be attributed to the shipowner who is on notice, since the doctor is supposed to report daily on those ill or injured (R. 130), and the doctor is a subordinate of the master. Under the trial court's view that the doctor must be shown negligent, we think there was more than enough to go to the jury.

The respondent takes the position that it is not responsible for the doctor's negligence or errors in treatment or diagnosis. We think the vessel must be made liable for the doctor's negligence. The members of the crew are at the mercy of the ship's doctor. They have no choice except to follow his instructions. It seems a preposterous situation that a shipowner can employ a doctor who is guilty of negligence in treating a crew member—or, as in our case, failing to treat by not leaving DeZon in Honolulu—and then escape liability by setting up the claim it has employed a licensed and competent doctor. We believe the vessel must be held liable for the ship's doctor's negligence in the same way as the ship is liable under the Jones Act for the negligence of any officer or crew member which injures another crew member.

The cited cases and principles applied to the facts of this case present a clear case for the application of the Jones Act based upon the ship's failure to furnish proper medical care, and for the trial court to have taken the case away from the jury and to have found that there was no possible basis for negligence is an absolute denial and abridgement of the right to maintain an action under the Jones Act with right of jury trial for this wrong in these circumstances. Under any consideration of fact and law, this was not a case for the court to substitute its judgment for that of the jury,

and there was certainly more than enough for the jury to pass upon in considering the doctor's negligence.

Consider further that the Jones Act is to be liberally construed with all presumptions and inferences resolved in petitioner's favor and the conclusion follows that the court erred in its interpretation and application of the statute.

POINT III.

The verdict is contrary to law in that the District Court should have allowed the case to go to the jury under the facts pleaded and proved.

A. Petitioner submits that the Court erred in granting respondent's motion for a directed verdict.

A directed verdict is proper only where (1) there is a *complete absence of pleading or proof* on an issue or issues material to the cause of action; or (2) there are *no controverted issues of fact upon which reasonable men can differ*.

3 *Moore's Federal Practice*, 3104.

The rule is stated:

"A directed verdict will be granted only where both facts and inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of one party that the court feels reasonable men could not possibly come to a contrary conclusion."

North Penn. Ry. Co. v. Commercial Bank, 123 U. S. 727;

Delaware etc. Ry. Co. v. Converse, 139 U. S. 469.

"*The Norland*" (C. C. A. 9) 101 Fed. (2d) 967, a Jones Act case where the court held that the question of whether a fisherman-seaman was an employee or a joint adventurer was for the jury to decide, and reversed a judgment on directed verdict.

Where the evidence is conflicting or there is insufficient evidence to make only a "one way" verdict reasonably possible, a directed verdict is improper.

Delk v. St. Louis etc., Ry. Co., 220 U. S. 580;

Self v. N. Y. Life Ins. Co., 56 F. (2d) 364.

Nor is it proper to direct a verdict where a contrary verdict, if rendered, would be set aside as against the weight of the evidence.

3 *Moore's Federal Practice*, 3106;

Garrison v. U. S., 62 F. (2d) 41;

Wheeler v. Federal & Deposit Co., 63 F. (2d) 562;

Rodriguez v. Phillips, 85 F. (2d) 995.

In ruling on the motion, the Court views the evidence in the light most favorable to the party against whom motion is directed.

Empire State Cattle Co. v. Atchison, T. etc. Ry., 210 U. S. 1;

Gunning v. Cooley, 281 U. S. 90;

Corsicana Natl. Bank v. Johnson, 251 U. S. 68.

Let us apply the above principles to our case.

B. *There is no absence of pleading.*

The complaint charges a negligent failure on the part of respondent to furnish medical care which, resulting in loss of petitioner's right eye, constitutes personal injuries and is actionable under the Jones Act.

Cortes v. Baltimore Insular Line, supra.

C. *Nor is there absence of proof.*

Let us take the evidence in the light most favorable to petitioner with all the inferences to be drawn therefrom.

Reviewing the facts, can it be stated that there was a "Complete absence of proof" or that the evidence was such

that reasonable men could bring in only a respondent's verdict? We think not.

The fact remains that respondent should have put petitioner ashore in Honolulu because that was the advice given by Dr. Yap, and that would have saved the eye. That is the inference and conclusion that must be drawn from the evidence.

We think the failure of the doctor to report a serious eye injury to the master at a time when a report was necessary and it can be reasonably inferred that the failure to report was due to the doctor's absence from the ship, and the respondent thereby failed to render medical aid. Surely these negligent omissions cannot be excused by the declaration that all the vessel has to do is furnish a licensed and competent doctor. That cannot be the law. The finding should be that the vessel failed to render proper medical care.

At least there was sufficient proof in this case to allow the jury to decide whether the vessel gave adequate medical care.

Leone v. Booth S. S. Co., 232 N. Y. 183, 133 N. E. 439.

In the last cited case, the jury returned a verdict for plaintiff which was reversed by the Appellate Division on the ground that all the vessel had to do was furnish a competent doctor. (We think more than that is required.) The seaman's injury had been improperly diagnosed by the ship's doctor as a result of which the seaman suffered great pain. The master failed and refused to put the seaman ashore for hospitalization. Held: It was for the jury to decide whether the master (and vessel) rendered adequate medical care.

We think the *Leone* case is persuasive authority for the proposition that the question of proper medical care was for the jury.

See also,

Stevens v. O'Brien (C. C. A. 1), 62 F. (2d) 1933 A. M. C. 871,

where a defendant's verdict was instructed upon the ground that plaintiff cook assumed the risk of coal gas poisoning which he alleged he suffered from a defective stove aboard ship. Held, that the facts stated by plaintiff's counsel must be assumed true for the purpose of instructing a verdict for defendant, and therefore it was error to take the case away from the jury.

We need not take petitioner's counsel's statement in our case. We have more. We have the facts adduced at the trial. Certainly there is more than enough here to send the case to the jury, and it was error for the Court to instruct the jury for respondent, and to deny petitioner's motion to set aside said order and allow a new trial.

POINT IV.

The verdict is contrary to the evidence in that taking the case in the most favorable light to petitioner, as must be done since the verdict was directed against him, there was sufficient evidence upon which the jury could have found for him.

We will not review the evidence or the facts most favorable to petitioner. They have been set out.

We submit that these facts are sufficient to support a plaintiff's verdict for the ship's failure to render medical care. Each case must stand upon its own facts, in the final analysis.

The Iriquois, supra.

The facts here are such that reasonable men could well find a failure to render medical care. Certainly under the liberal rules applicable in Jones Act cases, if a plaintiff's

verdict had been found, the appellate courts would hesitate long before setting it aside.

The Iriquois, supra;

Cortes v. Baltimore Mail Line, supra.

Consider just these points to support a plaintiff's verdict:

1. The failure of the Second Engineer to send DeZon for treatment on the day of the injury.

2. The absence of the doctor from the ship for the entire evening before she sailed.

3. The failure of the vessel to leave DeZon in Honolulu, although that was advised as necessary by Dr. Yap, and first class hospital facilities were available ashore without a bit of inconvenience to the ship.

4. The indifferent and careless attitude of the ship's doctor to DeZon, in not having a record of issuing the master's certificate, in not bringing what was a serious eye condition to the master's attention at the time when it might have done some good, and in ordering DeZon to return to the mainland.

We feel that it is most reasonable to conclude that the verdict was contrary to the evidence.

Conclusion.

We respectfully submit that the trial court was in error in taking this case away from the jury, and that the Circuit Court's decision was likewise wrong. We submit that a reversal is in order.

Respectfully submitted,

GEORGE R. ANDERSEN,

Of Counsel.

HERBERT RESNER,

Attorney for Petitioner.

Dated: December 24, 1942.

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OCT 28 1942

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CLERK

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1942

No. 436

JOSEPH DE ZON,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.
(a corporation),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TREADWELL & LAUGHLIN,

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Official Citation of Principal Case in Circuit Court

DeZon v. American President Lines, Ltd. (C. C. A. 9th,
July 3, 1942), 129 Fed. (2d) (Adv.) 404

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1942

No.

JOSEPH DE ZON,

Petitioner,

VS.

AMERICAN PRESIDENT LINES, LTD.

(a corporation),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF ISSUES.

The Circuit Court of Appeals held that the case was properly disposed of by a directed verdict for respondent steamship company for two reasons:

(a) It was established that due care and diligence were exercised by the steamship company to employ and retain in its employ a competent physician, and if there was any negligence either in diagnosis, treatment, or hospitalization, it was that of the physician, and under the circumstances

the steamship company could not be held liable; and

(b) Even if, in some way or other, the conduct of the doctor could be said to be attributable to the steamship company, there was no substantial or competent evidence to establish that the doctor had been negligent, and no case was made out for the jury,—and if a verdict based upon the negligence of the ship's doctor had been returned, the court would have been obliged to set it aside.

Petitioner omits and avoids discussion or argument on the first proposition, and his presentation is directed to the proposition that there was some evidence from which the jury might have been warranted in finding that the ship's doctor was chargeable with some negligence in respect of diagnosis, treatment, or hospitalization. Petitioner also makes the suggestion, entirely unsupported by the record, of some negligence of a second engineer on the vessel. Each of these propositions will be separately considered:

I.

THE CARRIER FURNISHED THE CREW WITH A COMPETENT PHYSICIAN AND SURGEON SELECTED WITH REASONABLE CARE, AND UNDER THOSE CIRCUMSTANCES IS NOT LIABLE FOR ANY MISTAKE OF THE DOCTOR, EITHER AS TO DIAGNOSIS, TREATMENT OR HOSPITALIZATION.

The undisputed evidence shows that defendant employs a chief surgeon, Dr. Rodney A. Yoell (R. p. 124, lines 9-10). One of his duties is to select and appoint

the medical personnel on ships, including ships' surgeons (R. p. 124, lines 13-14). The ship surgeon on this voyage was Dr. Will Lewis (R. p. 97, lines 6-10). Before he was employed, his qualifications were fully inquired into and favorably passed upon (R. pp. 124-126). Records were investigated, a personal interview was held, and recommendations obtained (R. pp. 124-126). It was established and not disputed that Dr. Lewis had attended Cooper Medical College, graduated from the Medical Department of the University of Southern California in 1907, interned after graduation at Cedars Hospital in Los Angeles, been licensed to practice in California, engaged in private practice in Santa Barbara, California, for five years, thereafter practiced in Ventura, California, until World War I, was in war service for two years, did special surgical work in Ventura until 1929, and did clinical work in Los Angeles until becoming ship's surgeon in April, 1940; while not a specialist in the eye he had the knowledge of the eye of a general practitioner (R. pp. 96, 107, 125). Further, it was stipulated at the trial that due care had been observed by the company in making the selection (R. pp. 126-129).

The Circuit Court of Appeals summarized the facts as follows:

"Dr. Rodney Yoell, chief surgeon for defendant, testified that he interviewed Dr. Lewis before he was engaged by defendant; that he was satisfied with the results of the interview; that he learned that Dr. Lewis graduated from a recognized medical school; that he checked the official

list of doctors licensed to practice in California and ascertained that he held an active license to practice in that state; and that as a result of inquiries concerning Dr. Lewis's reputation, he determined that he was a man of good character. There is no allegation that defendant was negligent in making its selection, nor is there any evidence showing negligence in that respect. Further, no showing has been made that subsequent to taking Dr. Lewis into its employ, defendant became chargeable with knowledge that he was incompetent, if such were the fact. Therefore, it must be taken as established that due care and diligence were exercised by defendant to employ and retain in its service a competent physician."

The full measure of the company's legal obligation to furnish proper medical care was to use reasonable care to select a reasonably competent doctor, and it fully discharged this obligation. The proposition that a steamship company has the legal duty to furnish proper medical care to sick or injured seamen is not disputed. *However, when, as here, a doctor is carried and made available aboard the ship, the steamship company discharged its full measure of legal duty to furnish proper medical care, provided it used reasonable care to select a reasonably competent doctor of good standing.* If the company was not careless in making its selection, it is not liable in the event of negligence or malpractice of the doctor. The company is responsible only for its own negligence, not for that of the doctor so chosen.

The Great Northern (CCA, 9th) 251 Fed. 826 ("We think it clear that appellees had discharged their full duty when they employed the physician,

after taking pains, as they did, to inquire of his antecedents and fitness,");

The Korea Maru (CCA, 9th, 1918), 254 Fed. 397 ("It is not charged in either of the libels or the amendments that the claimant was negligent in the selection of, or in the employment of, the physician and surgeon, or that his incompetency or lack of skill, as charged, was subsequently ascertained by the claimant, and that with such knowledge he was retained as an employee of the vessel. In the absence of such a charge, and competent evidence to sustain it, we pass over the evidence relating to the lack of skill and competency on the part of the physician and surgeon in the treatment of Omito Stogazu");

Bonam v. Southern Menhaden Corp., 284 Fed. 360 (holding complaint of injured seaman alleging negligence of doctor furnished by defendant employer is subject to demurrer unless it includes "allegations bringing home to the defendant knowledge that the surgeon was unskilled");

Johnson v. American Mail Line, 1937 AMC 1267 (holding complaint of seamen against shipowner for injuries resulting from negligence or malpractice of surgeon employed by shipowner did not state cause of action when it appeared shipowner used reasonable care and diligence in selection of competent surgeon to act as medical officer on vessel);

The Neapolitan Prince, 134 Fed. 159 ("It is not necessary to decide * * * whether the physician was guilty of negligence. Even so, his errors, mistakes, or negligence are not imputable to the ship. It is not shown that the ship was negligent in selecting him");

Geistlinger v. International Mercantile Marine, 295 Fed. 176. (holding injured seaman not entitled to recover for failure of unlicensed ship doctor to send him to hospital as requested, since "This would be error of judgment on his part for which the shipowner would not be liable");

The Sarnia, 147 Fed. 106 (holding injured seaman not entitled to judgment where competent doctors consulted and, because of error in diagnosis, he was not given shore hospitalization and insufficient treatment aboard ship was prescribed);

Branch v. Compagnie Generale Transatlantique, 11 Fed. Supp. 832 ("It seems to be well settled that a shipowner does his whole duty if he employs a qualified and competent surgeon and medical practitioner, and supplies him with all necessary and proper instruments, medicines, and medical comforts, and has him in readiness for such passengers as choose to employ him");

The C. S. Holmes, D.C., 209 Fed. 397, 399 (The master is not negligent when he exercises reasonable care in selecting and employs a regularly licensed physician, believing him to be competent, and intrusts the injured seaman to his care, in the belief that such physician will render careful and competent treatment);

Leone v. Booth S.S. Co., 178 N.Y.S. 620 (holding instruction correct that "no liability can be predicated here for anything which the doctor did in his failure to properly diagnose or treat that case" since "if the ship's doctor was competent, and the appliances and facilities in the ship's hospital were sufficient, the defendant was not liable");

Laubheim v. DeK. N.S. Co., 107 N.Y. 228, 13 N.E. 781, 1 Am. St. Rep. 815 (holding if ship's surgeon erred in treatment it did not prove incompetence or that it was negligent to appoint him, and stating "If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for neglect of that duty. * * * It is responsible solely for its own negligence, and not that of the surgeon employed");

McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529 (holding a corporation established for the maintenance of a public charitable hospital which exercised due care in selection of its agents not liable to injury to patient caused by their negligence);

56 C. J. 1070, Sec. 594 ("The employer is under a duty to use reasonable care and diligence in providing a physician or surgeon competent to treat the disability incurred. But where not derelict in its duty of care and diligence in the selection of a physician or surgeon, the employer is not responsible for damages resulting from his incompetence, negligence, nor error in professional judgment, such as a mistake in diagnosis.").

Petitioner complains because after the ship's chief surgeon ascertained that the ship doctor had been licensed to practice medicine in California in 1908 and that he continued to practice up to the time of his employment by the carrier, he did not check to find whether this license was renewed in 1939 and 1940. In the absence of any evidence that he was not licensed

during those years, we deem this contention unworthy of serious consideration. In fact, whether he was licensed in California is in itself immaterial.

Geistlinger v. International Mercantile Marine,
295 Fed. 176.

However, having been licensed in California, this raised a presumption of competency.

State Board of Medical Examiners v. Taylor,
129 S.W. 600.

Petitioner also complains because the ship surgeon was not a specialist in eye diseases. Of course, a ship's doctor cannot be a specialist in the many branches of medicine and it is neither expected nor required that he should be. However, the evidence shows that in this case the ship's doctor had the knowledge of the eye that a general practitioner generally has (R. p. 96, lines 107, 125), and had treated similar conditions of the eye; the matter of paint, or rust, or a chip in the eye being a common occurrence aboard ship (R. p. 103, lines 26-30). Clearly the doctor had sufficient knowledge to enable him to exercise judgment in determining whether he could treat a particular eye condition or whether he should send the patient ashore for special treatment.

Petitioner also argues that the ship surgeon was incompetent in fact. In the first place, this is immaterial because the question is whether reasonable care was used in his selection. However, the only evidence that he relies upon is, first, that the doctor did not follow the recommendation of Dr. Yap at Honolulu that the patient should be hospitalized ashore. This

was no evidence of incompetency because Dr. Yap also diagnosed the case as acute conjunctivitis, just as did the ship surgeon, and it is not claimed by anyone in the record that such an ailment could not be adequately treated on shipboard. Further, there seldom is a medical case where different doctors do not have different views or opinions, and it obviously is no test or proof of a doctor's incompetency that some other doctor might have had a different opinion regarding treatment or hospitalization. The second contention in support of alleged incompetency is that the doctor had no recollection of issuing a master's certificate at Honolulu and had no record of it. Even if we assume he did issue such a certificate and did forget it and did forget to make a record of it, that would be no evidence of incompetency as a physician. Both the trial judge and the judges of the court of appeals properly deemed such matters as this too trifling to constitute substantial evidence upon which a verdict of incompetency could be based.

II.

NO NEGLIGENCE OR MALPRACTICE ON THE PART OF THE SHIP'S DOCTOR WAS ESTABLISHED.

The fact that reasonable care was used by the company in selecting Dr. Lewis as medical officer aboard the President Taft having been conclusively determined by the evidence and the stipulation of plaintiff, and this being the full measure of the company's legal duty to furnish proper medical care, the jury could not have been warranted in reaching a conclu-

sion that the company had failed to furnish proper medical care. However, even if the company were responsible for the negligence or malpractice of the doctor (which we do not concede), no proof was made which would have warranted the jury in concluding the doctor was guilty in that regard. The facts regarding the action of the doctor with regard to diagnosis, treatment, and hospitalization are as follows:

About ten o'clock on the morning of June 4, 1940, plaintiff, while employed as a marine fireman on the S.S. President Taft, one of defendant's vessels which was on a return voyage from the Orient, while chipping and painting in the boiler room had a sudden pain in his eye and thought he got a chip or some paint in his eye (R. pp. 12-14; p. 15, lines 29-30). The ship carried a doctor and maintained a hospital and an orderly who acted as nurse and defendant knew these facts and knew that the doctor was available for treatment (R. p. 78, lines 22-30; p. 79, lines 3-7). However, he did not consider the matter serious (R. p. 18, lines 1-2) and instead of reporting to the doctor he went to his quarters where he kept an eye cup and eye wash and washed out his eye and had all the paint cleaned up (R. p. 16, lines 20-27; p. 73, lines 18-30). The next morning after he got up his eye was hurting him and he thought the best thing to do now was to go to the ship's doctor, which he did (R. p. 17, lines 16-20). Plaintiff told the doctor only that he had got a chip or some paint in his eye the day before and his eye was bothering him (R. p. 19, lines 1-5; p. 79, lines 7-14). The doctor made an examination of the eye (R. p. 99, line 1), found it red and

inflamed as is the normal condition resulting from irritation by a foreign body (R. p. 99 lines 1-13; p. 142, lines 24-30; p. 143, lines 1-17), diagnosed the condition as acute conjunctivitis (R. p. 116, lines 20-25), which is merely an inflammation of the conjunctiva or outer coat of the eye and under ordinary conditions clears up in two to four days (R. p. 104, lines 10-15), appropriately treated the eye for such condition (R. p. 17, lines 23-28; p. 18, lines 15-24; p. 99, lines 4-9; p. 103, lines 7-10; p. 104, lines 10-15; p. 139, lines 14-25), and relieved plaintiff from duty (R. p. 17, lines 23-28; p. 18, line 24; p. 19, line 5). That afternoon the ship arrived and docked in Honolulu and plaintiff was given a certificate to the Marine Hospital (R. p. 19, lines 12-26; p. 81, lines 2-7). When plaintiff arrived at the Marine Hospital about five o'clock in the afternoon it was closed so he went to the Queen's Hospital in Honolulu (R. p. 20, lines 1-11; p. 81, lines 7-10) where he saw a doctor named Dr. Yap whom plaintiff alleges to be a "competent physician" (R. p. 2, line 7). This physician made a thorough examination (R. p. 20, lines 12-16; p. 81, lines 12-24) and also diagnosed the condition as acute conjunctivitis (R. p. 59, line 10). Plaintiff returned to his ship where he was hospitalized in the ship's hospital (R. p. 20, lines 27-30; p. 84, lines 25-30; p. 85, lines 1-7). About 11:30 that same night about a half hour before the ship sailed from Honolulu, plaintiff again saw the ship's doctor (R. p. 82, lines 7-9; p. 21, lines 5-7, 19-21). Plaintiff claims that he then told the ship's doctor that he had seen a physician at the Queen's Hospital and such physician had

advised shore hospitalization. The ship's doctor had no recollection of plaintiff stating that the Honolulu physician had advised shore hospitalization and does not believe plaintiff so stated to him (R. p. 111, lines 18-21). In any event, plaintiff was given hospitalization as follows; for the five remaining days of the voyage (R. p. 87, lines 9-10) in the ship's hospital and surgery, and upon arrival in San Francisco in the United States Marine Hospital at that port. During the five-day period of his hospitalization in the ship's hospital he was served all of his meals in bed (R. p. 86, lines 1-4), was visited and treated by the ship's doctor several times a day (R. p. 103, lines 11-13; p. 60, line 30; p. 86, lines 12-13), was given almost constant attention by the ship's male nurse (R. p. 86, lines 25-30), and was given the treatment deemed appropriate by the ship's doctor (R. p. 17, lines 23-28; p. 18, lines 15-24; p. 99, lines 4-9), the physician at Honolulu (R. p. 59, lines 11-14), and an army surgeon with extensive experience in the Orient with eye infections, who was aboard ship and was called into consultation by the ship's doctor (R. pp. 104-105). Plaintiff's condition did not improve and after arrival in San Francisco he was hospitalized in the Marine Hospital (R. p. 50, lines 9-12; p. 87, lines 20-30; p. 88, lines 1-12) and after extensive examinations it developed that he was not suffering from acute conjunctivitis but from intraocular hemorrhage (R. p. 25, lines 6-11; p. 41, lines 9-10). An operation was later performed at the Marine Hospital and plaintiff lost the sight of his eye (R. p. 40, line 26).

A. The diagnosis.

When plaintiff reported to the doctor he stated that he had got a chip or some paint in his eye the day before (R. p. 19, lines 2-3). His eye was red and inflamed as is the normal condition resulting from irritation by a foreign body (R. p. 99, lines 1-13; p. 142, lines 24-30; p. 143, lines 1-17). He withheld from the ship's doctor the information he subsequently gave to the doctors at the Marine Hospital in San Francisco regarding previous eye trouble (R. p. 79, lines 9-17; p. 43, lines 22-24; p. 45, line 18; p. 65, lines 9-12; p. 68, lines 18-28; p. 71, line 21). Actually the trouble had been a matter of years (R. p. 48, lines 10-25.) The ship's doctor made the usual examination where a foreign body is complained of in the eye (R. p. 109, lines 4-5), and it did not appear unusual or dangerous but was the ordinary eye condition that he met from similar accidents (R. p. 122, lines 22-27). The symptoms from a paint chip getting in the eye are identical with those experienced by plaintiff (R. p. 142, lines 24-30; p. 143, lines 1-17). The ship's doctor had treated similar conditions of the eye; the matter of, getting paint, or rust, or a chip in the eye being a common accident aboard ship (R. p. 103, lines 26-30). Without any history of a blow there was no reason to suspect an eye hemorrhage (R. p. 116, lines 20-30). An eye hemorrhage is a serious disease (R. p. 112, lines 5-6) and for a blow to cause a hemorrhage it would have to have some weight behind it; not a mere chip of paint (R. p. 123, lines 1-10). There was no history of any blow sufficient to cause a hemorrhage and he did not consider that paint would cause such

a hemorrhage (R. p. 116, line 23). In diagnosing an injury considerable weight is given to the history (R. p. 54). A medical man not a specialist in eye disorders could very well mistake a hemorrhage for acute conjunctivitis (R. p. 149, lines 7-10), and even a specialist would not be of the opinion that a hemorrhage would be caused by paint getting in the eye (R. p. 139, lines 4-9). Symptoms of conjunctivitis might be present even where there was a hemorrhage (R. p. 56, lines 18-19). The ship's doctor's diagnosis of acute conjunctivitis was confirmed by Dr. Yap, whom plaintiff alleges in his complaint to be a "competent physician" (R. p. 2, line 8), after extensive examination in the Queen's Hospital at Honolulu (R. p. 59, lines 6-14; p. 81, lines 17-23). An army doctor aboard ship, who had had extensive experience in the Orient in eye diseases, and who was called into consultation by the ship's doctor, made an examination of plaintiff after he left Honolulu and had no suggestion for treatment other than that being given for acute conjunctivitis (R. pp. 104-105). Dr. Jerome Bettman, an eye specialist, testified that paint would not cause an intraocular hemorrhage (R. p. 139, lines 1-9). After arrival in San Francisco and after an extensive series of examinations at the Marine Hospital the trouble was first diagnosed as an intraocular hemorrhage traumatic in origin (R. p. 25, lines 6-11). However, when no foreign body was found and the patient divulged that he had had an old optic neuritis trouble (R. p. 43, lines 22-24), had had a non-traumatic tumor removed from the eye (R. p. 45, line 18), had had a muscle operation on the eye in

1937 (R. p. 65, lines 9-12), had had a cyst removed (R. p. 68; lines 18-28), and had been in the hospital for gonococcus in 1940 (R. p. 71, line 21), they changed the diagnosis as being a hemorrhage of unknown origin (R. p. 41, lines 9-10). Even after the examination and treatment at the Marine Hospital in San Francisco, and the full records and history of the patient became available, it could not be stated how long his eye had been in a serious condition prior to his admission to that hospital (R. p. 47, lines 7-14).

The most that can be said is that the ship's doctor, like the doctor in Honolulu, and the doctors at the Marine Hospital in San Francisco in the first instance, made a mistake in diagnosis.

No doctor is infallible; probably no doctor has ever been correct in every diagnosis made or treatment given; neither is he omniscient. A doctor is required only to have the usual training and skill ordinarily possessed by a practitioner of good standing in similar practice, and he is responsible only where it is established by expert testimony that he did not act as a reasonably skillful and experienced practitioner in similar practice would have acted in similar circumstances. Where he possesses and uses such skill and care, he is not responsible for mistakes or for errors in judgment; and he is not to be held liable on the ground that he did not act as a specialist would have done in the circumstances.

Engelking v. Carlson, 13 Cal. (2d) 216, 88 P. (2d) 695;

Callahan v. Hahnemann Hospital, 1 Cal. (2d) 447, 35 P. (2d) 536;

Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654;

Perkins v. Trueblood, 180 Cal. 437, 181 P. 642;

Neudeck v. Vestal, 117 Cal. App. 266, 3 P. (2d) 595;

Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128;

Scott v. McPheeters, 33 Cal. App. (2d) 629, 92 P. (2d) 678, 93 P. (2d) 562.

A physician is not held to a higher degree of responsibility in making a diagnosis than in prescribing treatment.

Patterson v. Marcus, 203 Cal. 550, 265 P. 222;

Donahoo v. Lovas, 105 Cal. App. 705, 712, 288 P. 698;

Brewer v. Ring, 177 N. C. 476, 99 S. E. 358, 364.

Mere proof that a diagnosis was wrong or mere failure to diagnose correctly will not support a verdict.

Adams v. Boyce, 37 Cal. App. (2d) 541, 549-550, 99 P. (2d) 1044;

Rising v. Veatch, 117 Cal. App. 404, 3 P. (2d) 1023;

Beni v. Abrons, 130 Cal. App. 206, 19 P. (2d) 523;

Donahoo v. Lovas, 105 Cal. App. 705, 712, 288 P. 698;

Patterson v. Marcus, 203 Cal. 550, 265 P. 222;

Nicholas v. Jacobson, 113 Cal. App. 382, 298 P. 505.

In any event, an error in diagnosis made by the doctor cannot fasten liability upon the shipowner.

*"If the doctors made some errors of diagnosis, as most competent physicians and surgeons sometimes do, and thus prescribe a treatment not sufficient to insure safe return to the United States, the fault should not be charged to those who faithfully administered that treatment."**

The Sarnia (C. C. A. (2d), 1906), 147 Fed. 106, 108.

B. The treatment.

Plaintiff was hospitalized aboard the ship (R. p. 20, lines 27-30; p. 84, lines 25-30; p. 85, lines 1-7) and was visited and treated several times a day by the ship's doctor (R. p. 103, lines 11-13; p. 60, line 30; p. 86, lines 12-13), and was given practically constant care by the ship's male nurse (R. p. 59, lines 11-14). The treatment given him included boric wash, yellow oxide, and eye pad (R. p. 60, lines 16-17; p. 86, lines 5-21; p. 87, line 24; p. 103, lines 8-17). This was the same treatment as that recommended by the physician who examined him in Honolulu (R. p. 59, lines 11-15), and whom plaintiff alleges was a competent physician (R. p. 2, line 8), and the army doctor aboard ship with extensive experience in eye diseases, after examination and consultation, had no other suggestion (R. pp. 104-105). The treatment given him was the appropriate treatment for acute conjunctivitis (R. p. 139, lines 14-25), and was one which had successfully

*Italics here and throughout this brief have been added unless otherwise noted.

been used many times by the ship's doctor in the treatment of similar ailments (R. p. 105, lines 25-27). If the condition had been diagnosed as intraocular hemorrhage the proper treatment would have consisted merely of dilating the pupil with a mydriatic, such as atropin, and bed rest, and since the patient had bed rest the only other treatment that could have been given would have been to use such dilating medicine, the only effect of which would be merely to alleviate some of the patient's pain (R. p. 139, lines 26-30; p. 140, lines 1-22).

The most that can be said concerning the treatment given is that, in view of information later developed, some other treatment might have been used. However, nothing whatever appears to warrant any charge of malpractice or neglect (see authorities cited and reviewed, *supra*, pp. 15-16).

If there was an error in treatment it was merely an error of judgment on the part of the doctor, for which neither the doctor nor the shipowner is liable.

In *The Great Northern* (C. C. A. 9th, 1918), the court, in its opinion holding a steamship owner not liable for alleged improper treatment by the ship's doctor, said:

"If there was error in treatment, it was a mistake in judgment, and it does not prove incompetency."

In *The Van Der Duyn* (C. C. A. 2d, 1919), 261 Fed. 887, the court in reversing a judgment awarding damages to an injured seaman, said:

"The ship will not be held responsible for an error of judgment on the part of the officers, if their judgment is conscientiously exercised with reference to conditions existing at the time * * *.

We do not think that error of judgment of the officers of the ship, *or the surgeon who was employed*, and the lapse of time before the respondent received competent medical aid, are sufficient upon which to base liability."

C. Hospitalization.

Plaintiff was given hospitalization in the ship's hospital and surgery the same day he first reported to the ship's doctor (R. p. 20, lines 27-30; p. 84, lines 25-27; p. 85, lines 1-7). He continued to receive such hospitalization, with constant care and attention by the ship's doctor and male nurse, until the ship arrived in San Francisco five days later (R. p. 86; p. 87, lines 9-10; p. 103, lines 11-13; p. 60, line 30). Upon arrival in San Francisco plaintiff was given hospitalization in the Marine Hospital which is under the charge of the United States Public Health Service (R. p. 50, lines 9-12; p. 87, lines 20-30; p. 88, lines 1-12).

Plaintiff now claims he should have been sent from the ship while it was in Honolulu, and some hospitalization should have been arranged for him at that place.

The ship arrived in Honolulu the same day plaintiff first reported to the ship's doctor. It remained there only a few hours, and sailed at midnight for San Francisco. Although the patient's condition did

not then appear serious, the ship's doctor while in Honolulu gave careful consideration of the matter of plaintiff's hospitalization. After weighing all factors and again examining the plaintiff (R. p. 21, lines 8-9), the doctor decided that the more advisable course would be to continue plaintiff's hospitalization aboard ship and, if his condition warranted on his arrival in San Francisco five days later, to have him hospitalized in the Marine Hospital in that city.

In arriving at his opinion the many factors given consideration by the ship's doctor included the then apparently minor character of plaintiff's injury, the diagnosis of acute conjunctivitis, the hospital facilities available aboard ship, the continuous availability of himself and the male nurse aboard ship, the fact that the ship was only five days from San Francisco (R. p. 87, lines 9-10); the fact that the patient desired and preferred to continue with the ship to San Francisco (R. pp. 82-84, 93-94; p. 29, lines 18-19).

Hospitalization, or the lack of hospitalization, or the nature and character of hospitalization, is merely one phase or angle of the broader matter of treatment, and it is subject to the same rule and is controlled by the same established principle (see cases cited and reviewed, *supra*, pp. 15-16). No legal responsibility attaches to the vessel because of a mere mistake in judgment of the ship's surgeon respecting the hospitalization given or that should be given.

In *Geistlinger v. International Mercantile Marine*, 295 F. 176, the court, in holding that a seaman who alleged he was not given proper hospitalization was

not entitled to recover damages from a steamship company, said:

"The libelant, who impressed me as an honest man, testified very vaguely about a request to the ship's doctor to be sent to a hospital in Southampton, which the doctor does not recall. The charge made against the ship's surgeon is that, there being a possibility of a fracture of the nose, which could not be detected at the time, he should have sent libelant to a hospital at Southampton for expert treatment. *I think this would be an error of judgment on his part for which the ship-owner would not be liable.*"

It has been noted that plaintiff expressed the desire and preference that he continue with the ship until its arrival in San Francisco five days later. In a case where the seaman had expressed his desire to return to the United States, although there was no doctor or hospital aboard ship and the voyage back was a long one, the court said:

"As to leaving him in the hospital at Port Limon, the District Judge says that it is immaterial whether or not the libelant wished to be left there. But this was not a mere matter of preference. It was a choice of evils. When a man injured, even as Greco was, protests against being left unacclimated in midsummer in a yellow-fever port, it is a very serious responsibility to assume to overrule his protest and expose him to what he may reasonably assume to be a deadly peril. Had he been left there and his hand healed quickly, but with the result of bringing him down with an attack of yellow fever, it might well be contended that the master was inhuman in not

heeding his protest and bringing him back to the port of shipment, especially since the doctor gave assurance that the voyage might be made without risk to the hand. We are not inclined to hold the ship liable, because the master, relying on that assurance, acceded to libellant's expressed wish."

The Sarnia (C.C.A. 2d, 1906), 147 Fed. 106, 108-109.

In any event, the seaman was furnished with the hospitalization that the doctor deemed best under the circumstances, and even if the doctor had been wrong in his opinion in this regard, and even if the doctor should properly have directed other hospitalization than that furnished, the shipowner has no liability:

"The ship's officers might fairly be entitled to conform their conduct touching any medical or surgical question to the instructions of men (doctors) thus qualified to decide it."

The Sarnia (C.C.A. 2d, 1906), 147 Fed. 106, 108.

III.

BECAUSE OF THE ABSENCE OF EXPERT TESTIMONY ESTABLISHING NEGLIGENCE, THERE WAS NO COMPETENT EVIDENCE WHATEVER ON WHICH THE JURY COULD HAVE BASED A VERDICT FOR PETITIONER.

If the matter had gone to the jury, the jury would have been met at the outset with the presumption that the doctor exercised ordinary care and skill required of him in diagnosing the case and treating the patient.

Engelking v. Carlson, 13 Cal. (2d) 216, 221, 88 P. (2d) 695;

Donahoo v. Lovas, 105 Cal. App. 705, 288 P. 698;

Foreman v. Hunter Lumber Co., 36 Cal. App. 763, 765, 173 P. 408.

This presumption could not be overcome by mere proof of mistaken judgment. Nor could it be overcome by any inferences or conclusions the jury itself might assume to reach from the facts and the circumstances relating to the matters of diagnosis, treatment, and hospitalization. These are questions *solely* for experts and can be established *solely* by the testimony of experts. In the absence of expert testimony establishing the fact that the doctor negligently failed to give proper treatment under the circumstances, or that he negligently failed to advise proper hospitalization, there was no competent evidence whatever on which the jury could act.

In *Ewing v. Goode* (C.C.), 78 F. 442, Judge Taft, when Circuit Judge, stated:

"But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependant on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, *there is no evidence of it proper to be submitted to the jury.*"

* * * * *

"I would deem it my duty without hesitation to set aside a verdict for the plaintiff in this case as often as it could be rendered, and, that being

true, it becomes my duty to direct a verdict for the defendant."

See also:

Moore v. Tremelling, C.C.A. 9th, 75 F. (2d) 821;

Wilson v. Borden, 61 App. D. C. 327, 62 F. (2d) 866;

Engelking v. Carlson, 13 Cal. (2d) 216, 222, 88 P. (2d) 695;

Patterson v. Marcus, 203 Cal. 550, 265 P. 222;

Taylor v. Fishbaugh, 26 Cal. App. (2d) 300, 79 P. (2d) 174;

Adams v. Boyce, 37 Cal. App. (2d) 541, 99 P. (2d) 1044;

McNamara v. Emmons, 36 Cal. App. (2d) 199, 97 P. (2d) 503;

Roberts v. Parker, 121 Cal. App. 264, 8 P. (2d) 908;

Adkins v. Ropp, 14 N.E. (2d) 727;

Ramberg v. Morgan, 218 N.W. 492;

Lippold v. Kidd, 269 Pac. 210;

Barker v. Heany, 82 S.W. (2d) 417.

No expert in this case undertook to testify as to what standard medical care was required of Dr. Lewis under the circumstances that were actually presented to him as the ship was about to sail from Honolulu on June 4th. The only opinions given in the case were based on conditions which developed, and were observed at the Marine Hospital on and after June 10th. There is certainly no opinion given that both the ship doctor and the Honolulu doctor should have

diagnosed the case as intraocular hemorrhage instead of conjunctivitis. The mere testimony that different treatment than that given might have been better in view of the ultimate finding of hemorrhage, in no way establishes that either the ship doctor or the Honolulu doctor was guilty of any negligence or in any way violated standard practice in reaching the diagnosis of acute conjunctivitis or in appropriately treating plaintiff therefor.

In fact, no one has even testified as to what the standard treatment was for hemorrhage. Dr. Faed testified that the treatment given at the Marine Hospital should have been given earlier, but how much earlier he did not say, and Dr. Bettman testified that it was dangerous to use that method at the early stages of the ailment. Neither of them attempted to say that the views of either constituted a recognized standard view of the subject. Every difference of medical view does not constitute standard practice, and it is only where it can be said that a doctor has violated standard practice recognized by the profession in a particular place, that he can be said to be guilty of malpractice or negligence.

All of the medical testimony is to the effect that shore hospitalization was unnecessary if the man was suffering merely from acute conjunctivitis. It is the uncontradicted medical testimony that the symptoms of conjunctivitis are often present in case of hemorrhage and that the two diseases might readily be mistaken, particularly by a general practitioner with the equipment that he would generally carry. No one

has testified that such a diagnosis of acute conjunctivitis arrived at under such circumstances constituted malpractice, as that term has many times been defined by the courts.

Of course, the testimony of the doctor at the Marine Hospital at San Francisco, based upon the diagnosis made at that hospital, that hospitalization and the treatment, customarily used for hemorrhage might have been beneficial, cannot be of any weight in determining whether the decision of the ship's surgeon to continue the treatment for conjunctivitis, which was his diagnosis, was or was not proper.

IV.

NO PROOF WAS MADE TO ESTABLISH THAT PLAINTIFF'S CONDITION WOULD HAVE BEEN DIFFERENT IF HE HAD BEEN GIVEN DIFFERENT TREATMENT, AND, THEREFORE, NO DAMAGE WAS SHOWN.

Obviously, plaintiff could not make out a case for damages without affirmatively proving that his condition was caused by defendant's improper acts. If his condition would have been the same irrespective of the treatment given and hospitalization furnished, then, of course, he suffered no damages and there could be no basis for an award of damages. The plaintiff had the burden of affirmatively proving through experts that different treatment and different hospitalization would have caused different results. No such proof was made.

Dr. Faed of the San Francisco Marine Hospital, in response to questions of plaintiff's counsel, testified that he was "unable to give any opinion" as to whether any different result would have been obtained if plaintiff had been given the treatment afforded at the Marine Hospital at an earlier date, and, in response to questions by the court, he testified that he didn't "wish to go on record either way" on the question of the possible effect of hospitalization in Honolulu (R. pp. 49-53):

"Mr. Resner. Q. Tell me this, Doctor, could any treatment have been afforded, according to your examination—would earlier treatment than that which was afforded in the Marine Hospital in San Francisco have helped Mr. DeZon?

A. Possibly.

The Court. Q. What is the answer?

A. Possibly.

Q. Is it your opinion that treatment along the line that was first given, when Mr. DeZon entered the Marine Hospital should have been had by Mr. DeZon at an earlier date?

A. *I could not answer that.*

Q. Well, then, you do feel, however, that this treatment that the Marine Hospital in San Francisco gave on June 10th and following should have been given on June 4th and following is that correct?

A. I should judge so.

Q. If such treatment as was given in the Marine Hospital on June 10th and following had been afforded Mr. DeZon on June 3rd, 4th and following, can you give me your opinion as to whether that might have saved his eye?

A. *That is too difficult for me to answer.*

Q. Is it possible for you to give me the best opinion you can, and you can explain it if you like, Doctor.

A. *I am unable to give an opinion about that.*

Q. From your observation of Mr. DeZon in the hospital, and your history of the case; and the diagnosis as made and your observations, and all the facts and circumstances surrounding this case, can you give me your opinion as to whether Mr. DeZon should have been hospitalized on June 3rd and 4th, when this trouble to the eye first occurred?

Mr. Treadwell. We object to that, your Honor, on the ground that it embodies numerous things, that there is no foundation of fact—for instance, what his condition actually was at that time, what it appeared to be, and what the physician saw and what the physician knew, what kind of a hospital the physician had on the boat, and all those things are conclusions, without any supporting basis.

Mr. Resner. I think it is a proper question.

The Court. I will allow the question.

Mr. Resner. Q. You may answer the question. Do you want the reporter to read it?

Witness. Please.

The Court. Read the question, Mr. Reporter. (Question read.)

A. I believe he should have been hospitalized; it might have helped some.

The Court. Now, then, you say 'might'. Would that mean that you have a doubt as to whether it would?

A. *I have a doubt, yes.*

Q. *In other words, it might not?*

A. Yes.

Q. *You don't wish to go on record either way? That is correct, is it?*

A. *That is correct.*

Mr. Resner. Q. Let me ask you this question, Doctor Faed: Had you been in charge of Mr. DeZon and had the direction as to what should have been done to him, under all the facts and circumstances developed in this case, would it have been your instruction to hospitalize him at the time this trouble to the eye developed on June 4th?

Mr. Treadwell. The same objection to that, it is the same question.

The Court. If he wants to change his answer, I presume—

A. I think I would have advised it, from what I know of the records.

Q. In other words, not being sure whether you should or should not, you would have given the advantage to the patient?

A. That is right."

Dr. Jerome Bettman, an eye specialist, testified as follows (R. p. 141):

Q. Now what is the probability of recovery from a hemorrhage such as described in this case?

A. The prospect of recovering even passable good vision is very poor, and the prospect of loss of the eye is rather good.

Q. Well, the word—my associate thought the word should be—maybe you could make it a little more definite.

A. Well, should we say that there is only a slight chance of recovering good vision? In fact, it is rather—

The Court. Q. It is a remote possibility?

A. That is right, *it is a remote possibility.*"

In regard to the hospitalization he testified in response to questions by plaintiff's counsel as follows (R. p. 150):

"Q. And with respect to whether or not under the facts and circumstances as revealed in this case Dr. Faed testified that DeZon should have been hospitalized when this trouble first arose, would you agree or disagree with that?

A. As the question is stated, I would agree with it. *However, in view of the fact he was under the care of a general man, I believe that it is—in fact, I know it is a little too much to expect of the average general man to be certain that this case is or is not serious, or to be certain of the diagnosis within a relatively short time.*

Q. Granting that what you say is true, if a hospital, fully equipped hospital, with eye specialists in attendance, was available, and this condition arose, would you, as a specialist, have referred him to the hospital or kept him on with a general practitioner?

A. Well, I, as a specialist, would have referred him to the hospital, of course."

Dr. Faed's testimony that he was "unable to give any opinion" and that he didn't "wish to go on record" as to the possible effect of different treatment or hospitalization, can serve no purpose except to show that it is impossible for even an expert to say that plaintiff might have been any better off in the event he had been accorded different treatment or hospitalization. The testimony of Dr. Bettman, the eye spe-

cialist, that regardless of the treatment or hospitalization, the chance of plaintiff recovering was a "remote possibility" falls far short of the required affirmative proof through experts that the shipowner was responsible for plaintiff's failure to recover from his eye disease. Facts must be established, at least with reasonable certainty, and here a "remote possibility" cannot be said to establish any fact. Any finding that plaintiff might have had different results if given different medical treatment and hospitalization would, at most, be a mere conjecture standing upon the basis of uncertain inference, and clearly insufficient to discharge plaintiff's burden of affirmative proof through experts.

In *Copeland v. Hines*, 269 Fed. 361, 363, the court said:

"A mere conjecture, standing upon a basis of uncertain inference, does not make substantial evidence. Such a case lacks both the quantitative and the qualitative essential minimum."

See to same effect:

Baltimore & O. R. R. Co. v. Kast, 299 Fed. 419, 422.

In *The Harry Buschman*, 33 Fed. 558, 560, the court in denying a seaman damages for alleged improper treatment aboard ship, said:

"And even now, considering the length of time that had then elapsed since the accident, the special skill necessary in the treatment of such a case, and the fact more than half the cases of 'Collis fractures', when treated at once, instead of after a

lapse of 40 days, do not result in perfect cures, it is doubtful whether the final result would have been better had he been left at one of the Spanish hospitals. The medical experts say that even had the wrist been treated in the best manner at once on arrival at Pasages, that is, 40 days after the fracture, it is not probable that it would have been sufficiently restored for the libellant to continue an able seaman. * * * In every aspect of the case, there remains too much of doubt, and a failure of the necessary preponderating proof on the libellant's part to authorize me to charge the ship with fault."

In *Geistlinger v. International Mercantile Marine*, 295 Fed. 176, the court, in denying a seaman's claim for damages against a steamship company because of the ship doctor's failure or refusal to send the seaman to a hospital at Southampton while the ship was at that port, pointed out that:

"there is no evidence that if he had been left at Southampton the treatment there would have been different from what he received on board, or that a better result would have ensued."

In *Moore v. Tremelling*, C.C.A. 9th, 78 F. (2d) 821, the court said:

"Moreover, even if we assume that both the initial treatment and the subsequent care of the plaintiff were negligent, there is a fatal defect in the proof because it is not shown that proper treatment would have produced a better result. * * * It cannot be assumed that, in the absence of malpractice the result would have been better, it

must be shown by the evidence of expert witnesses.

“The motion for a directed verdict should have been granted.”

In *Ewing v. Goode*, 78 F. 442, Judge Taft, then Circuit Judge, in directing a verdict for defendant, stated:

“Again, when the burden of proof is on the plaintiff to show that the injury was negligently caused by defendant, it is not enough to show the injury, together with the expert opinion that it might have occurred from negligence and many other causes. Such evidence has no tendency to show that negligence *did* cause the injury. When plaintiff produces evidence that is consistent with a hypothesis that the defendant is not negligent, and also one that he is, his proof tends to establish neither.”

See also:

Barker v. Heany, 82 S. W. (2d) 417;

Kramer Service, Inc. v. Wilkins, 186 So. 625;

American Nat. Ins. Co. v. Smith, 47 S. W. (2d) 1078;

Henley v. Mason, 153 S. E. 653;

Clayton v. English, 57 App. D. C. 324;

Wright v. Conway, 241 Pac. 369, 242 Pac. 1107.

V.

THERE IS NO BASIS WHATEVER FOR THE CONTENTION THAT THERE WAS ANY SUBSTANTIAL EVIDENCE THAT WOULD SHOW NEGLIGENCE BY SHIP'S OFFICERS OTHER THAN THE SHIP SURGEON.

1. In this particular the petitioner first claims that there was negligence in failure to have the ship's doctor on board while the ship was at Honolulu between 6:00 P.M. and 11:30 P.M. We think the court will take judicial notice of the custom to take shore leave when the ship is in port, and no evidence whatever was introduced that the doctor was violating any rule in being absent from the ship while it was in port. In fact, a seaman has no right to require that a physician be on board the vessel, either in port or out of port.

The Wensleydale, 41 Fed. 602;

Geistlinger v. International Mercantile Marine,
295 Fed. 176.

In the absence of the physician the seaman could have gone to any other officer and asked to be given treatment or to be sent ashore. Moreover, there is no evidence that indicates that the doctor would have made any different diagnosis or reached any different conclusion as to hospitalization if he had examined the petitioner immediately upon his return to the ship rather than when he examined him a few hours later.

2. Petitioner also tries to suggest some negligence on the part of the second engineer. His testimony was that when his eye first began to hurt "I just notified the man in the fire room I was going topside" (R. p. 14, lines 26-27). He then testified that he went to his room and washed out his eye and then testified

"I notified the Second, that is, Mr. Bangs, that I had something the matter with my eye" (R. p. 15, lines 7-9). He did not know whether this was in the morning that he was hurt or that night (R. p. 78, lines 16-29). It is perfectly clear that he did not consider there was anything seriously wrong with his eye because he continued to work and did not ask to be relieved and did not go to the doctor whom he knew was on board and available, and it would be unreasonable to conclude that he conveyed to the second engineer that there was anything seriously wrong with his eye which required medical attention. It was not until the next morning that he himself concluded to go to the doctor. Obviously, since the ship was at sea at that time, if the second engineer had been made to know that there was anything wrong with the petitioner's eye, all he could have done would have been to send him to the ship's surgeon. He certainly could not at that time have sent him to a shore hospital. This contention obviously does not rise to the dignity of substantial evidence of neglect.

3. The next matter mentioned in the petition is that the doctor failed to notify the master of the plaintiff's infirmity. On the contrary, the evidence shows that the doctor prepared daily health reports that showed the diagnosis of petitioner's trouble and these were daily delivered to the master (R. p. 97, lines 10-17). Acute conjunctivitis, according to all the evidence, is considered a trivial affliction which in a few days responds to a simple and well-known treatment. There was no occasion, therefore, for the physician to specially consult the master (R. pp. 103, 104).

VI.

CASES RELIED UPON BY PETITIONER.

A complete review of the cases cited by petitioner is hardly necessary. In *Jacob v. City of New York*, U. S., 86 L. ed. (Adv.) 750, the court found that a substantial question of fact was presented, and that therefore the case should go to the jury.

In *Cortez v. Baltimore Insular Line*, 287 U. S. 367, 77 L. ed. 368, the court neither held that there was negligence nor that such was the cause of death, but merely held that negligent care causing death gave the personal representative an action under the Jones Act, the lower court having erroneously held to the contrary.

The case of *The Korea Maru*, 254 Fed. 397, involved a case where no attention whatever was given to the seaman and this was participated in by the ship's officers as well as the doctor, while the case at bar is a case of alleged faulty diagnosis by the doctor alone.

In *Anelich v. "Arizona"* (Wash.), 1935 AMC 1332 the neglect was due entirely to the fault of the officers of the ship. The same is true of *Persson v. Gulf Refining Co.*, 239 N. Y. S. 796.

In *Unica v. United States*, 1923 AMC 455, the fault was the fault of the master.

In *Nahme v. United States*, 1926 AMC 1150, the chief engineer thought the seaman was a malingerer and so reported to the master with the result that the master paid no attention to the seaman.

In *Leone v. Booth S.S. Co.*, 232 N. Y. 183, 133 N. E. 439, the master himself was responsible as he acted in direct opposition to the advice of the ship surgeon. However, in that case it was held:

"a steamship owner is not liable for negligence of a competent ship's surgeon and the Master may rely on his advice received in good faith, and, so acting, no liability can be predicated on error or mistake."

The above cases were relied upon by petitioner in his appeal to the Circuit Court of Appeals. They are reviewed at some length and clearly shown to be inapplicable and not in point in the opinion of that court.

VII.

SOME POINTS STRESSED BY PETITIONER.

1. On page 10 of petitioner's brief he denies the statement that petitioner told the ship doctor that he preferred to go to San Francisco. This is strictly in accordance with the record (R. pp. 83, 84).

2. Petitioner stresses the fact that the seaman testified that he told the doctor that unless he was hospitalized he stood a good chance to lose the sight of his right eye. Assuming that this report was given the doctor, the doctor was not required to put any credence in it in view of the fact that he had diagnosed the case as acute conjunctivitis and the Honolulu doctor had done the same, and the testimony is undisputed that acute conjunctivitis is not a serious condition (R. pp. 55, 104, 110).

3. The statement on page 19 that, the doctor being absent when petitioner returned to the vessel at Honolulu, the failure to give petitioner any treatment constituted negligence. According to his own testimony, he had been given treatment by the ship doctor before the ship arrived at Honolulu; the doctor gave him a master's certificate to enable him to obtain medical and hospital treatment at Honolulu, and he voluntarily returned to the ship and asked nothing of any officer of the ship, but was put to bed by the orderly, and as soon as the doctor returned the doctor examined him and decided that he was able to take care of him. There is no evidence whatever that anything happened to him due to the absence of the doctor from the time the petitioner returned at 6:00 P.M. and the time that the doctor returned at 11:20 P.M. If on his return he had asked the master for permission to leave the ship and the master had refused it, there might be some basis for argument.

4. On page 26 petitioner refers again to the fact that at some time during the day he was injured he told the second engineer that he had something the matter with his eye, and he claims that it was negligence for the second engineer not to have told him to go to the doctor. However that may be, he did go to the doctor early the next morning and the doctor diagnosed the case as acute conjunctivitis and gave him the proper treatment therefor, and there is no evidence whatever that any different diagnosis would have been made by the doctor if he had been consulted the night before.

5. In several places in petitioner's brief reference is made to testimony of eye specialists based not on what was known at the time the ship's surgeon diagnosed the case at Honolulu, but after further facts had been developed at the Marine Hospital at San Francisco, and the diagnosis of intraocular hemorrhage was made. The testimony of specialists that in case of intraocular hemorrhage certain treatment might have been beneficial and that hospitalization was proper throws no light on the question of negligence of the ship's doctor, who, from the history given and the appearance of the eye, diagnosed the case as acute conjunctivitis, as did Dr. Yap at the Queen's Hospital in Honolulu.

CONCLUSION.

We respectfully submit that there was no substantial evidence of negligence of the ship's doctor or ship's officers, that all the evidence showed that the company had used reasonable care to select a competent physician, and that it was not liable for any error of judgment of such physician. Accordingly, the petition should be denied.

Dated, San Francisco, California,
October 26, 1942.

TREADWELL & LAUGHLIN,
EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,

Attorneys for Respondent.

p. 1 dissent

SUPREME COURT OF THE UNITED STATES.

No. 436.—OCTOBER TERM, 1942.

Joseph De Zou, Petitioner,	} On Writ of Certiorari to the	
vs.		United States Circuit Court
American President Lines, Ltd.		of Appeals for the Ninth Circuit.

[April 5, 1943.]

Mr. Justice JACKSON delivered the opinion of the Court.

Petitioner, a seaman, brought an action at law under the Jones Act¹ against the respondent shipowner. He alleged that while in the service of its ship he suffered injuries which resulted in the loss of his right eye because of the negligence of the ship's doctor in treating him and in failing to have him hospitalized ashore. The trial court directed a verdict against him. The Circuit Court of Appeals affirmed for the reason, among others, that the shipowner's duty to the seaman was only to use due care in selecting a competent physician and, that being done, was not responsible for his incompetence or negligence. 129 F. 2d 404. This holding raised an important question of federal law under the Jones Act not passed on heretofore by this Court. Accordingly we granted certiorari. — U. S. —

The petitioner signed articles as a marine fireman for a voyage from San Francisco to the Orient and return on the respondent's passenger ship *President Taft*. The voyage was of about sixty days' duration, ending at the home port on June 10, 1940. On June 3, while petitioner was painting the outside of a boiler, a chip of dry aluminum paint lodged in his right eye, followed probably by getting some of the liquid paint in as well. He went to his quarters and washed the eye with a wash in an eye cup. At this time he did not believe that anything was seriously amiss with his eye, and he returned to work. When he arose the next morning he was suffering considerably from his eye. He told the ship's doctor of this history, and the doctor examined his eye without the aid of any special equipment, washed it out with a boric solution, irrigated it with argyrol, and bandaged it. He told peti-

¹ 41 Stat. 1007, 46 U. S. C. § 638.

tioner not to work, and the petitioner repaired to his quarters and stayed there until the ship came into Honolulu about 4:00 in the afternoon. Then the ship's doctor gave him authority from the master to go ashore for examination at the outpatient department of the Marine Hospital in Honolulu. Petitioner found this closed and went to Queens Hospital. There he was examined by Doctor Yap, a physician of unspecified qualifications, who diagnosed the injury as "acute traumatic conjunctivitis" [injury to outer coating of eye resulting from a blow], washed out the eye with a boric acid wash and applied yellow oxide and an eye pad. Doctor Yap told the petitioner that he could not do much for him, but advised petitioner to get off the ship and be hospitalized ashore. The petitioner returned to the ship, arriving at about 6:00 in the evening. The ship's doctor was ashore, and, since the petitioner did not feel well, the ship's medical orderly put him to bed. Forty minutes before sailing time the ship's doctor returned. He saw petitioner at 11:30 and was informed of Doctor Yap's recommendation, then told the petitioner that: "Well, if you want to take a chance or a gamble on it you can go on to the States. It don't look so bad. It can be all right." The petitioner answered: "You are the boss; if you want to go, let's go."

The ship sailed at 12:00 midnight on June 4 with petitioner hospitalized aboard. The petitioner's injured right eye got steadily worse, and, in the ship's doctor's term, was in an "alarming" condition two or three days later. The ship's doctor sought the advice of another doctor, a passenger, who had resided in the Orient and was familiar with eye infections common there. He thought that none of these was present, but suggested that petitioner be given sulfapyridine, a drug used to combat eye infections; and this advice was followed. On arrival at San Francisco on June 10, the petitioner was taken to the Marine Hospital by ambulance.

On the evening of June 11, a consulting eye specialist was called in. In the belief that there was a foreign body in the eye he recommended an X-ray, which was made on the next day. Thereafter he reported that the anterior chamber of the eye was filled with dark hemorrhage material, and that in that chamber there was "fibrin . . . or scar of previous operation, most likely the former," with the comment that "This is a peculiar looking eye which is difficult to fit in with the history of impact

with paint scale or possible steel fragment: The hemorrhage suggests perforation with injury to iris or ciliary body. There is small likelihood of a contusion causing it." Petitioner's injury was finally diagnosed on June 15 as "Hemorrhage, anterior chamber, right eye, traumatic." The eye was removed on July 5. In the course of aftertreatment there was entered in the hospital records, on September 10, the statement that: "At this time patient changes history of injury and also states he had a muscle operation on right eye in 1937. Injury now alleged to cause the disability was a scale of paint in the eye and it is the opinion of the surgeon in charge that this would give an intraocular hemorrhage such as was present in the right eye. Diagnosis changed September 10, 1940."

Doctor Faed, connected with the Marine Hospital in San Francisco, who had removed the eye, was called as petitioner's witness. He testified that whether an eye injury can be diagnosed as conjunctivitis, as the ship's doctor had diagnosed it, or as a hemorrhage, as was finally the diagnosis at the Marine Hospital, depends upon the doctor and the facilities at his command. He was asked on direct examination whether "if such treatment as was given in the Marine Hospital on June 10th and following had been afforded Mr. De Zon on June 3rd, 4th and following, . . . that might have saved his eye," and answered that "I am unable to give an opinion about that." Then, in response to a question whether, on the basis of the whole history of the case, including that developed at the Marine Hospital at San Francisco, it was his opinion that petitioner "should have been hospitalized on June 3rd and 4th, when this trouble to the eye first occurred," he answered that: "I believe he should have been hospitalized; it might have helped some." He did not wish, however, to "go on record" as saying that it would have aided, and testified further on direct examination that, not being sure whether to hospitalize petitioner at the earlier date, he "would have given the advantage to the patient." Another and apparently equally well qualified eye specialist, offered as respondent's witness, testified, as did the ship's doctor, that the ship's doctor had given the standard treatment for conjunctivitis, and that additional treatment such as was given the petitioner at San Francisco would have had no beneficial effect, and might have had harmful effects, if given before the period of time which elapsed on the voyage to San Francisco. This specialist also testified, and without contradic-

tion, that it was too much to expect of the ordinary general practitioner, such as the ship's doctor was, to be able to diagnose petitioner's case as a dangerous one.

The testimony of respondent is uncontradicted that the ship's doctor was a duly licensed physician in California, a general practitioner with some surgical experience, and was selected only after careful inquiry had satisfied the Chief Surgeon of the respondent that he was a competent man for the post. It is conceded that proper investigation was made, and it was learned that he was a man of good reputation and character.

Respondent's Chief Surgeon also testified that authority to decide whether a seaman should be treated, and the manner of treatment, was vested in the master, who had authority to disregard any recommendation in this regard that the ship's doctor might make. See also, R. S. § 4596, 46 U. S. C. § 701; R. S. § 4612, 46 U. S. C. § 713.

The Circuit Court of Appeals in considering this case held that the shipowner's duty ended with the exercise of reasonable care to secure a competent general practitioner and since there could be no question that such care had been exercised, the shipowner could not be held liable in damages for harm that could have followed the negligence of the ship's doctor. In our opinion this was error.

The Jones Act reads in pertinent part as follows: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; Thus it makes applicable to seamen injured in the course of their employment the provisions of the Federal Employers' Liability Act, 45 U. S. C. §§ 51-60, which gives to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees. *Panama R. Co. v. Johnson*, 264 U. S. 375; *The Arizona v. Anelich*, 298 U. S. 110; *O'Donnell v. Great Lakes Dredge & Dock Co.* (No. 520, decided February 1, 1943).

Cortes v. Baltimore Insular Line, 287 U. S. 367, 377-378, explained the effect of the Jones Act as follows: "Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty

must be legal, i. e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail." Recovery was accordingly allowed under the Jones Act for the negligence of the master in the discharge of the ancient duty to provide maintenance and cure for a seaman wounded in the service of the ship.

We are of opinion that the reasoning of the *Cortes* case is controlling, and that there is nothing in this case to shield the shipowner from liability for any negligence of the ship's doctor.

Immunity cannot be rested upon the ground that the medical service was the seaman's and the doctor's business and the treatment not in pursuance of the doctor's duty to the ship or the ship's duty to the seaman.²

"The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations."

² Liability to a passenger injured by the negligence of a ship's doctor has been denied on this ground. One of the leading cases on liability to passengers is *Laubheim v. DeK. N. S. Co.*, 107 N. Y. 228. It arose before, but was decided after, the enactment of the Act of Congress of August 2, 1882, 22 Stat. 186, 188, 46 U. S. C. § 155, imposing upon ships carrying certain types of passengers the obligation of providing a "competent" doctor for the benefit of the passengers. The plaintiff, a passenger, sued the shipowner for personal injuries resulting from alleged negligence of the ship's surgeon. Judge Francis M. Finch disposed of the case in a short opinion, in the apparent belief that the rule applied was not sufficiently in question to warrant discussion. He said: "If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty. (*Chapman v. Erie R. Co.*, 35 N. Y. 579; *McDonald v. Hospital*, 120 Mass. 432; *Secord v. St. Paul R. R. Co.*, 18 Fed. Rep. 221.) It is responsible solely for its own negligence and not for that of the surgeon employed." The *Chapman* case tested liability of a railroad by the "fellow servant" doctrine, which has been abolished by the Federal Employers' Liability Act and can therefore have no application in this case. *Jamison v. Encarnacion*, 281 U. S. 635. The *Secord* case gives only a charge to a jury in a case where the issue was liability of a railroad to a passenger for negligent treatment by a physician in its employ. The *McDonald* case held a hospital immune from liability for negligence of its house surgeon on the ground that it was a charitable institution.

O'Brien v. Cunard Steamship Co., 154 Mass. 272, arose under the Act of August 2, 1882, and was decided after the *Laubheim* case, upon which it relied. Judge Knowlton of the Massachusetts Supreme Judicial Court said: "Under this statute it is the duty of ship-owners to provide a competent surgeon, whom the passengers may employ if they choose, in the business of healing their wounds and curing their diseases. The law does not put the business of treat-

The Iroquois, 194 U. S. 240, 241-242. When the seaman becomes committed to the service of the ship the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter.³ This duty does not depend upon fault. It is no merely formal obligation and it admits of no merely perfunctory discharge. Its measure depends upon the circumstances of each case—the seriousness of the injury or illness and the availability of aid. Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting in to the nearest port although not one of call, hailing a passing ship, or taking other measures of considerable cost in time and money. Failure to furnish such care, even at the cost of a week's delay, has been held by this Court to be a basis for damages. *The Iroquois*, *supra*.

To provide a ship's physician was therefore no mere act of charity.⁴ The doctor in treating the seaman was engaged in the shipowner's business; it was the ship's duty that he was discharging in treating the injured eye. While, no doubt, the physi-

ing sick passengers into the charge of common carriers, and make them responsible for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. . . . The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of the statute of the United States applicable to such cases. . . . *Id.* at 275-276.

These statements of judges of great learning, for courts of last resort of states having much to do with maritime pursuits, had their influence upon the federal courts dealing with the same problem. *The Great Northern*, 251 F. 826; *The Korea Maru*, 254 F. 397, 399; *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832; cf. *The Neapolitan Prince*, 134 F. 159.

³ The duty is not to "cure" in a literal sense, but to provide care, including nursing and medical attention. *Calmar S. S. Corp. v. Taylor*, 303 U. S. 525, 528. It has not been restricted by the Shipowners' Liability Convention of 1936, 54 Stat. 1693, which provides in Article 12 that "Nothing in this Convention shall affect any law, award, custom or agreement between ship-owners and seamen which ensures more favourable conditions than those provided by this Convention."

⁴ We express no opinion upon whether charitable or gratuitous nature of medical attention should have exculpatory effect. Cf. *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810.

cian recognized at least an ethical obligation between himself and the patient, he was performing the service because the ship employed him to do so, not because the petitioner did. He was not an independent practitioner, called to treat one whose expenses the ship agreed to make good. We express no view as to the liability for malpractice by one not in the employ of the ship.⁵ But in this case the physician was not in his own or the seaman's control; he was an employee and as such subject to the ship discipline and the master's orders.

Whatever, in the absence of the Jones Act, might have been the effect upon respondent's liability of the fact that petitioner and the ship doctor were both in its employ, that Act prevents this fact from conferring an immunity upon the respondent. *Jamison v. Encarnacion*, 281 U. S. 635; *Cortes v. Baltimore Insular Line*, *supra*.

We hold, therefore, that the shipowner was liable in damages for harm suffered as the result of any negligence on the part of the ship's doctor.⁶

We come, then, to the question as to whether there was sufficient proof of negligence to require sending this case to the jury.

The short of the case is that the petitioner failed to disclose the past history of the eye to the ship's doctor, and the ship's doctor diagnosed the case as one of conjunctivitis and gave the petitioner what undisputed medical testimony says to be the standard treatment for that condition. Going ashore, the case was diagnosed similarly by a physician of unstated qualifications, who treated the eye in the same manner as the ship's doctor. Returning to the ship, the petitioner told the ship's doctor of the shore doctor's recommendation that he leave the ship and be hospitalized ashore. The ship's doctor acknowledges that he would have heeded such a recommendation had it been made, but asserts that it was not made.

⁵ Cf. *The Sarnia*, 147 F. 106; *The C. S. Holmes*, 209 F. 970; *Bonam v. Southern Menhaden Corp.*, 284 F. 360 (involving physicians other than ship's doctors).

⁶ *Johnson v. Anderson Mail Line*, 1937 A. M. C. 1267 (Superior Court for King County, Washington), reached the opposite conclusion, relying upon cases cited in footnotes 2 and 3, *supra*, which we think are inapposite for the reasons already stated. *Geistlinger v. International Mercantile Marine Co.*, 295 F. 176, also denied liability for the ship's doctor's negligent treatment of a seaman, but it did not find the Jones Act applicable, and did not consider what its effect might be if it should be found applicable. *Leone v. Booth S. S. Co.*, 232 N. Y. 183, also denied liability, but it was decided on facts antedating the Jones Act, and it too did not consider the effect of the Act.

For purposes of testing the correctness of the direction of the verdict, we must assume that the ship's doctor was told of it. The concession of the ship's doctor that he would have heeded such a recommendation is not of itself evidence of negligence. There is not a word of evidence that the shore doctor was any better qualified to diagnose the eye than was the ship's doctor, and as a matter of fact his diagnosis of the case was the same as the ship's doctor's. That their prognoses were different does not establish either that the one was overly cautious or that the other was negligent in failing to take the same attitude as to the necessity of hospitalization ashore. Our own experience vividly demonstrates that careful and competent men frequently reach different conclusions despite the fullest and most careful examination of all available data, including the difference of opinion on the part of their associates. In the present case neither doctor had the benefit of all the facts of the eye's history. The character of the petitioner's affliction was not ascertained until days after the petitioner reached San Francisco, and then only after an outside consultant was called in to advise the eye specialists in the Marine Hospital. True it is that one doctor said, partly on the basis of the facts disclosed long after petitioner's eye had been removed, that he would have recommended hospitalization at Honolulu, and that additional treatment at the time petitioner was en route to San Francisco might have had a beneficial effect; but even on the basis of the knowledge available at the trial he would not venture an opinion that treatment such as was given at San Francisco would have saved petitioner's eye if given before or at the time he reached Honolulu. Another, and apparently equally well qualified eye specialist testified that nothing in addition to the standard course of treatment for conjunctivitis, which the ship's doctor gave, could have been done with safety until after the petitioner's arrival in San Francisco, and that any attempt to do more probably would have actually impaired petitioner's chances of saving his eye. He testified, and without contradiction, that it was too much to expect of the ordinary general practitioner, such as the ship's doctor was, to be able to diagnose petitioner's case as a dangerous one.

In these circumstances it is said that the ship's doctor should have sent the petitioner ashore, despite the petitioner's desire to return to San Francisco with the boat; and although there is no evidence what the facilities were at Honolulu. Had he put peti-

tioner ashore only to have him lose his eye, it is conceivable that he would have been charged with neglect in doing that.

If there was malpractice in this case, no evidence of it has been put into this record. The surgeon who removed the eye was called as a witness. He testified that the cause of the trouble was a hemorrhage. But no professional opinion was offered as to when the hemorrhage took place. We do not know whether the ship's surgeon is accused of malpractice for failure to cure a hemorrhage which had already occurred when he was first consulted or because of failure to anticipate it and prevent it. Moreover, there is no proof whatever that, if a hemorrhage within the eye once occurred to an extent not absorbed by the ordinary natural processes, it is curable at all. If this petitioner was destined to lose his eye at all odds, he hardly establishes a cause of action by saying it should have occurred at Honolulu instead of San Francisco. Hospitalization either on ship or on land is not in itself a cure. At San Francisco, specialists had no cure for the eye but to remove it, and we are not told that anything different could have been done at any earlier stage with any probability that it would bring about a different result.

The doctor apparently made a wrong diagnosis, but that does not prove that it was a negligent one. It seemed to be the obvious diagnosis from the history which the patient gave him, and that appears to have been incomplete and not unlikely to mislead.

The loss of the petitioner's eye is a serious handicap. But damages may be recovered under the Jones Act only for negligence. *Jamison v. Encarnacion, supra*, at 639. Whether the legislative policy of compensating only on the basis of proven fault is wise is not for us to say, nor is it our function to circumvent it by reading into the law a theory, however disguised, that a physician who undertakes care guarantees cure, and that each unsuccessful effort of the physician may be visited with a successful malpractice suit.

Affirmed.

Mr. Justice RUTLEDGE did not participate in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 436.—OCTOBER TERM, 1942.

Joseph De Zon, Petitioner, } On Writ of Certiorari to the
vs. } United States Circuit Court
American President Lines, Ltd. } of Appeals for the Ninth Cir-
cuit.

[April 5, 1943.]

Mr. Justice BLACK, dissenting.

The issue in this case is: shall a jury or a court decide whether petitioner lost his eye through the respondent's negligence? I agree with the Court that the shipowner was liable for the negligence of its doctor, and I agree further that the Jones Act is not a workmen's compensation act and does not impose liability without fault; but I do not agree that a court may substitute its judgment on the facts for the decision of a jury when, as here, there is room for reasonable difference of opinion on the critical issue of the case. I think there was sufficient evidence to permit a jury to find negligence in the doctor's failure to leave the petitioner at Honolulu for hospital treatment.

The evidence showed that this seaman sustained an injury so serious that it resulted in the eventual removal of his eye. When a seaman is injured, the shipowner has an imperative obligation to come to his aid;¹ and the shipowner's responsibility is so heavy that he may be found negligent for failure to take his ship to the nearest port in order to provide adequate treatment.² There is a similar obligation to leave a seriously injured seaman in a port at which a vessel has arrived.³ This duty of course exists where no adequate treatment can be given on the ship. Here the ship's doctor was not an eye specialist; the ship did not have aboard the medicines which competent physicians in San Francisco applied; and there was no x-ray although one was later found essential for

¹ Hardin v. Gordon, 2 Mason 541; Reed v. Canfield, 1 Sumner 195.

² The Iroquoia, 194 U. S. 240, 242.

³ The United States guarantees the cost of maintenance and return to the United States of injured seamen discharged in foreign ports. 46 U. S. C. § 683.

diagnosing the ailment. It is not surprising that the ship should lack these facilities, for every merchant vessel cannot be a floating hospital; but it is for this very reason that a ship is required to furnish shore treatment for seriously injured seamen.

The United States Marine Hospital in Honolulu had all the facilities which the ship lacked. These hospitals are recognized government institutions and a seaman has no burden to prove that the equipment and treatment in the hospital would have been better than the equipment and treatment on the ship. Here as in *Leone v. Booth Steamship Co.*, 232 N. Y. 183, 185, "It is to prefer shadow to substance to make the result of this action depend on affirmative proof of this matter."

What was the evidence on which the jury could have found that the seaman should have been left for treatment in this hospital? The petitioner's eye began to pain him as a result of an accident on June 3, 1940. By 7 o'clock the next morning, the eye was in such condition that he required medical treatment from the ship's doctor and was released from duty. At 5 o'clock that afternoon the vessel docked at Honolulu. The ship's doctor sent him to the Marine Hospital, which was closed at that hour, and he went to Queens Hospital which, according to the evidence, is an emergency institution connected with the Marine Hospital and which takes care of patients temporarily. The doctor at Queens Hospital advised the petitioner that he should be released from his vessel and enter the hospital at once. This physician advised the seaman that he might lose his eye if he returned to the ship.

The petitioner returned to his vessel at 6 P. M. but was unable to see the ship's doctor until 11:30, approximately 30 minutes before the vessel sailed. He repeated to the ship's doctor the advice given him ashore. The seaman testified that the doctor told him that no danger would result from returning to San Francisco, and, since the doctor was his superior officer and an "accredited physician", he relied upon the doctor's advice although he was suffering intensely.

The petitioner's eye grew worse, treatment in the San Francisco Hospital failed to cure it, and it was removed. Two San Francisco specialists familiar with his case testified that they would have advised that he be left in Honolulu for hospital treatment. True, we have no testimony that the eye would have been saved by hospitalization at Honolulu, and whether it could have been

will never be known; but it is clear that the petitioner would have received excellent treatment at an earlier date than he did. Adequate treatment, of course, is usually aimed at curing or alleviating the serious consequences of injuries and diseases, and timely treatment can prevent progressive physical deterioration. Someone must decide whether such happy results would have followed earlier hospitalization in the instant case.

Directing a verdict against the petitioner in this case is substituting judicial for jury judgment on factual questions which can as readily be decided by the layman as by the lawyer. When we consider the weight of the evidence and resolve doubtful questions such as these, we invade the historic jury function. "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob v. New York City*, 315 U. S. 752. This constitutional command should not be circumvented.

Mr. Justice DOUGLAS and Mr. Justice MURPHY join in this dissent.